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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 308

DEAN MILK COMPANY,

Petitioner,

vs.

NATIONAL DAIRYMEN ASSOCIATION, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FRED A. GARIEPY,
One North La Salle Street,
Chicago 2, Illinois,
Attorney for Petitioner.

OWEN RALL,
135 South La Salle Street,
Chicago 3, Illinois,

JOHN SPALDING,
One North La Salle Street,
Chicago 2, Illinois,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 330 WEST JACKSON, CHICAGO

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Dean Milk Company, which was defendant in the trial court, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on June 16, 1950, Circuit Judge Otto Kerner dissenting (R. 105).

Opinions Below.

The memorandum opinion (R. 68) of the trial judge, Michael L. Igoe, is not officially reported. The opinion of the Court of Appeals (R. 95) and the dissenting opinion of Circuit Judge Kerner (R. 105) were not reported in

time to include the citation in this petition. It is expected that they will be reported as *National Dairymen Association, Inc.* v. *Dean Milk Company,* 183 F. 2d 349 (C. A. 7).

Jurisdiction.

The judgment of the Court of Appeals was entered on June 16, 1950 (R. 105). A petition for rehearing filed June 30, 1950 (R. 106) was denied on August 10, 1950 (R. 121). A motion by this petitioner for a hearing by the Court of Appeals in banc filed June 30, 1950 (R. 106), opposed by the respondent July 10, 1950 (R. 113), and additional suggestions of petitioner in support of that motion filed July 17, 1950, not contained in the printed record, addressed to all of the judges of the Court of Appeals, were never acted upon. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254 (1).

Questions Presented.

1. Whether the Court of Appeals properly interpreted and applied Rules 7 (a), 8 (d) and 15 (b) of the Federal Rules of Civil Procedure in affirming a judgment of $83,-918.20 against this petitioner on an unpleaded cause of action in favor of respondent, National Dairymen Association, Inc., a New York business corporation, for claimed loss of profits on an alleged contract for the purchase of evaporated milk wherein the petitioner was seller and the respondent was buyer. The complaint and the trial by the court without a jury proceeded on the theory that the respondent as buyer had *performed* its part of the contract; the trial court judgment was entered and the affirmance by the Court of Appeals was based on the theory that performance of the buyer's obligations under the contract had been *excused* by an anticipatory breach of the contract by the petitioner, the seller.

2. Whether the Court of Appeals followed the decisional law of the appropriate state (Illinois), this being a case where Federal jurisdiction was based entirely upon diversity of citizenship of the parties, in disregarding words in the petitioner's offer to sell evaporated milk which stated "this offer is subject to the government's acceptance for export". The respondent as buyer was given a judgment of nearly eighty-four thousand dollars for loss of profits without any allegation or proof either that respondent had obtained or might have obtained "the government's acceptance for export" of the 60,000 cases of evaporated milk involved in the offer.

3. Whether the courts below applied the proper measure of damages under Illinois decisions in allowing the respondent, as buyer, to increase its damages from $48,-150.00 to $72,300.00 (to which interest was also added) by selecting the date of the second refusal of the petitioner to recognize the existence of the disputed sales contract as the date on which to compute damages. This involves the question whether on a claim for anticipatory breach of contract, the first repudiation comprises the breach so that that date must be used for computing damages, notwithstanding the fact that the seller may have later again announced its adherence to the previous "repudiation".

Rules Involved.

Rule 15, par. (b) of the Federal Rules of Civil Procedure (Fed. Rules Civ. Proc., rule 15(b), 28 U. S. C. A.) is clearly involved in this case. We also quote below Rules 7 (a) and 8 (d) which were relied upon by the Court of Appeals (R. 104), although we do not perceive their applicability.

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS.

(*a*) *Pleadings.* There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

* * * * *

RULE 8. GENERAL RULES OF PLEADING.

* * * * *

(*d*) *Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS.

* * * * *

(*b*) *Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy

the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Statement of the Case.

Respondent, National Dairymen Association, Inc., which is a New York business corporation and not a trade association (R. 13), filed suit against Dean Milk Company, an Illinois corporation, in the United States District Court for the Northern District of Illinois on jurisdictional grounds of diversity of citizenship.

The complaint (R. 2-5) alleged the making of a contract by the petitioner to sell respondent 60,000 cases of evaporated milk by virtue of petitioner's letter dated May 16, 1946 (R. 4), mailed from Chicago, Illinois, to respondent in New York City, the text of which is given in the footnote,* and respondent's telegram to petitioner

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* Omitting the letterhead, address and signature, petitioner's letter of May 16, 1946, is as follows:

"We are very much interested in helping to feed the nations of Europe who are in dire need of foodstuffs. We offer you 60,000 cases Evaporated Milk for reasonably prompt shipment after confirmed letter of credit has been opened, for $4.55 per case, F.O.B. Factory, net cash, packed in export double strapped solid fibre cases.

"This offer is subject to the government's acceptance for export and if a permit is issued for us to ship on above basis, we will try to get you additional quantities at that time. These additional quantities will possibly be well in excess of the above amount on which we are giving you a firm offer today.

"This tender is made with the understanding we are to have a firm reply within two weeks from this date.

"This is all fresh packed milk guaranteed United States government standard in every respect."

dated May 27, 1946 (R. 5), which is also set forth in the margin.** These were attached to the complaint as exhibits. Paragraph 3 of the complaint was as follows (R. 3):

> "3. Plaintiffs have complied with all the terms and conditions of said contract by them to be performed and all conditions precedent contained in said contract have been performed or have occurred so that the plaintiffs are entitled to have delivered to them the Sixty Thousand (60,000) cases of evaporated milk as called for by the terms of the contract."

The complaint filed on October 18, 1946 further alleged that the defendant (petitioner) arbitrarily refused to deliver any cases of evaporated milk, that the price had now increased and that respondent had been damaged in the sum of $200,000.00, for which it demanded judgment (R. 3-4).

The petitioner's answer (R. 5-10) admitted the execution, delivery and receipt of the letter and telegram but denied that these writings formed a contract (R. 6, 9). The answer also denied (R. 7) that plaintiff had performed all conditions precedent as alleged in paragraph 3 of the complaint and specifically and in considerable detail alleged that plaintiff had failed to secure an export license for export of the evaporated milk in question (R. 6-7), that acceptance of defendant's offer was conditional upon the

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** Respondent's telegram directed to Sam E. Dean (now deceased), then president of the petitioner, is as follows:

> "This replies to your offer May 16 and to advise that we accept this offer of sixty thousand cases evaporated milk. Please advise delivery schedule."

prior issuance of such license (R. 6-9), and also that plaintiff failed to open a letter of credit covering the sale price of such milk, which was a condition precedent to the performance of any agreement (R. 8). No reply was filed by the plaintiff.

The case was tried to the court without a jury. The court found (R. 72-75) for the plaintiff and entered judgment for $83,918.20 against defendant (R. 75).

On appeal by defendant (petitioner here) to the Court of Appeals, the opinion (R. 95) was written by Swaim, Circuit Judge, joined by Finnegan, Circuit Judge, with Kerner, Circuit Judge, dissenting.

On the trial, it was shown that between the date of the petitioner's offering letter and the respondent's purported telegraphic acceptance, the respondent wrote petitioner on May 25, 1946, in part as follows (R. 68):

> "I am trying to have a few export licenses cleared together with fair rate of exchange so that we can ship some milk abroad; will be in further touch with you."

There is no claim that the respondent advised the petitioner before sending its "acceptance" of the offer on May 27th that respondent had not obtained an export license. Next came the respondent's telegram of acceptance dated May 27, 1946, already mentioned, which ended with the words: "Please advise delivery schedule" (R. 5, 63).

Because of its belief that its quoted price of $4.55 per case exceeded the then O.P.A. ceiling price, the petitioner immediately after receiving respondent's wire of May 27th, replied by wire on May 28th (R. 64):

> "Can ship 30,000 or 40,000 cases promptly Stop Must have letter credit apply against railroad bills of lading also export permit license before loading Stop This will need your immediate attention Stop Must have OPA authorization account over ceiling price Stop Writing airmail".

The airmail letter of May 28, 1946 is set forth in the record (R. 64) and in the opinion of the Court of Appeals (R. 97) and, *inter alia*, urged the respondent "to move fast on this if we are to get this order shipped. We cannot take any chances shipping without OPA authorization, the export permit license, and the letter of credit."

On June 6, 1946, the respondent without having replied to the request for letter of credit, export license and OPA authorization, sent a wire (R. 66) to petitioner saying, in part, "Only if necessary will you store without charge for how long" and also asking "what allowance portion domestic packing if expedient", indicating to the petitioner that respondent was planning not to export the evaporated milk as contemplated by the offer. On June 7th, the petitioner wired the respondent (R. 66):

> "We regret we are unable to confirm our offer made on May Sixteenth account your being unable to get export license also OPA confirmation of price for prompt shipment".

On June 15th, respondent threatened legal action by a telegram (R. 67) and on June 26, 1946, the petitioner wired (R. 67):

> "Dean Milk Company hereby notifies you of withdrawal of its offer heretofore made to you in regards to sale of sixty thousand cans of evaporated milk for good cause shown. We want no further correspondence or negotiations with you on this subject and declare same cancelled and terminated".

On the trial the respondent contended that, because of a permitted charge for export packing*, the petitioner's

* Section 2 of the Second Revised Maximum Export Price Regulations, 8 Fed. Reg. 4132, authorized "a person who buys for his own account a commodity for shipment outside the continental United States" to add to the seller's maximum price certain charges, *if shown separately on the*

quoted price of $4.55 a case was permitted by the May 20, 1946 Amendment (No. 54) to Revised Maximum Price Regulation 289 of the Office of Price Administration, fixing the ceiling price on evaporated milk in the zone here involved at $4.35 per case (11 Fed. Reg. 5597). The trial judge adopted this theory (R. 69, 73). He held that the fact that the ceiling price was $4.10 per case on the date on which petitioner made its offer, May 16, 1946 (RMPR 289, Amendment 3, 9 Fed. Reg. 5588) was immaterial, because he held that the ceiling price in effect when the offer was "accepted" on May 27th was the only material one.

Regardless of these technical considerations, it is clear that the petitioner's belief on May 27th that it needed OPA approval of its price of $4.55 per case was an honest belief. This is clearly shown by the fact that on that date the OPA ceiling price (except for the ingenious argument made on the trial that petitioner's price included export packing, which might by an entirely different regulation be added to the ceiling price permitted by RMPR 289) was $4.35 per case, and the petitioner's price was $4.55 per case.

It was the petitioner's insistence on respondent's obtaining the OPA approval of the price which the trial court held constituted a "waiver" by the petitioner of "any right it might otherwise have had to insist that plaintiff open a letter of credit or secure governmental acceptance of the milk for export; and plaintiff was accordingly excused by such conduct from opening a letter of credit or securing governmental approval or acceptance for export on or before June 26, 1946" (R. 73). Thus, the petitioner

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seller's invoice, including the extra packing expenses in excess of those incurred on domestic sales. In our case packing expense was not itemized, and no reference whatever was made in the offer or acceptance to packing expense.

is seriously prejudiced by the care it tried to use not to exceed the OPA ceiling price.

This finding, coming long after the taking of evidence at the trial, permitted a recovery on an unpleaded cause of action for anticipatory breach of contract.

The holding of the Court of Appeals was that this unpleaded issue was one actually tried with the petitioner's consent. The majority opinion specified no reason for concluding that defendant had consented to the trial of this unpleaded cause of action. Nor did the majority opinion discuss the substantive law prescribing the elements of an Illinois cause of action for anticipatory breach of contract or the evidence supposedly supporting that unpleaded cause of action. The drift of the majority opinion on this point is that a mere question of pleading governed by the Federal Rules of Civil Procedure was presented and the majority concluded that a "consideration of the entire record" carried the conviction that the issues necessary to support the judgment of the District Court were "tried and decided" without indicating what the issues were (R. 104). This vagueness of reference requires us to review, at greater length than otherwise would be justifiable, the course of the proceedings in the trial court.

As already stated, the complaint (R. 2-4) alleged a contract and performance of conditions precedent. The answer (R. 6-7) denied the alleged contract and the performance by the plaintiff of the conditions precedent of procuring an export license and opening a letter of credit.

The plaintiff's president conceded (R. 48-49) on cross-examination that plaintiff had neither procured an export license nor opened a letter of credit. The cause of action alleged was, therefore, unproved.

Apparently recognizing that the issue made by the complaint and answer was not proved, the plaintiff on the trial

attempted to shift its ground and show that while it had not performed, it was ready, able and willing to perform its obligations under the contract—proof which is an essential under Illinois law to support a cause of action for an anticipatory breach of contract by the other party to it.

To the plaintiff's attempt to show that plaintiff could have obtained an export license (R. 46), defendant's counsel promptly interposed an objection, which included this statement by counsel (R. 46):

> "The offer we made to him was that he supply us with an export license or permit for the sale and exportation of this milk. *It is up to him to show that he did supply it.*"

After plaintiff's counsel stated that he desired "to show we could have a license issued if it was desired" (R. 46), the trial judge sustained the above objection to the question.

The plaintiff's president also admitted (R. 48-49) that it was "*entirely impossible*" to procure an export license during May or June, 1946, although the trial judge later found, contrary to such admission, that plaintiff was ready, willing and able to comply with said contract "up to June 26" (R. 73) and the Court of Appeals relied on this finding to affirm (R. 102-103). Just as there is no evidence in the record touching upon plaintiff's ability to procure an export license, neither is there any evidence in the record that plaintiff was able to obtain a letter of credit, and the trial judge sustained defendant's objection to inquiry into this matter on the ground that such ability was immaterial (R. 47). This followed the sustaining of the defendant's previous objection with respect to the export license that it "is up to him to show that he did supply it." Respondent's counsel, Mr. Stough, did not acquiesce promptly in the trial court's ruling and the following colloquy occurred (R. 47-48):

Mr. Stough: If the Court please, we are trying to prove here that he was able to obtain a letter of credit, covering the sale of 60,000 cases.

The Court: Well, to save argument, you were able to do that, *and you were to provide a letter of credit, and you didn't do it.*

Mr. Stough: Before it became necessary to do that, they had waived that provision.

The Court: Then you come to a different part of the argument.

Mr. Stough: Yes.

The Court: *I don't see how that is material here.* They say you were able to provide a letter of credit, but you didn't do it. There is not any question about that, is there?

Mr. Gariepy [defendant's counsel]: *I don't know anything about this man's financial condition,* but we were not in any condition to go forward *until they met our terms* in regard to the license and the letter of credit.

The Court: But on the theory that he was able to secure them—

Mr. Gariepy: He might have been able to procure them, both of them.

Mr. Stough: All right. That is all I want on that. You may cross-examine.

At no time did the plaintiff's attorney ever indicate that he wished to amend his complaint to change his cause of action from one of performance to one of anticipatory breach of contract.

By sustaining the defendant's objections to proof of *ability to perform,* on the ground that the issue was *whether in fact the plaintiff had performed,* the trial judge clearly eliminated at the trial the issue of fact on which

he later entered a substantial money judgment against the defendant.

The trial judge found that there was a contract of sale although no export license was ever obtained, that the petitioner's insistence on OPA approval of the contract price excused the respondent from obtaining an export license or letter of credit, and that the petitioner's telegrams of June 7 and June 26, 1946, were each indications that the petitioner did not intend to be bound by the contract (R. 72-74). The trial judge held that the first telegram excused the plaintiff from opening a letter of credit or securing governmental acceptance for export "because it indicated that the defendant did not intend to be bound by its contract" (R. 73-74), and held that the second telegram "was a breach of contract on the part of defendant because it indicated a refusal on defendant's part to be bound thereby" (R. 74).

The trial court then fixed the damages at the date, not of the first telegram, but of the second, finding that on June 26, 1946, the market price of 60,000 cases of evaporated milk was $72,300.00 more than the contract price, added interest of $11,618.20 from June 26, 1946 (R. 74), and entered judgment for $83,918.20, which in turn bears interest since its rendition on September 13, 1949 (R. 75). If the damages had been computed on the date of the first telegram which the trial judge held was a repudiation of the contract, June 7, 1946, they would have been $48,150.00 instead of $72,300.00 (R. 35).

The Court of Appeals admitted that the complaint alleged performance of the contract and the judgment below was based on repudiation of the contract which excused performance (R. 104). Nevertheless, it held that under rules 7, 8 (d) and 15 (b), of the Federal Rules of Civil Procedure (which we have set forth above) the pleadings in this case "may be considered as amended to cover

the issues which were tried and decided" (R. 104). That court also held, Circuit Judge Kerner dissenting, that the words of the offer (that such offer was "subject to the government's acceptance for export,") did not make the *offer* subject to a condition precedent, but that only the performance of the *resulting contract* was subject to the procurement of the government's acceptance for export (R. 99-101). All of the conditions precedent (export license and letter of credit) were held excused without any pleading alleging that the respondent was ready, able and willing to carry out the contract on its part and that it was excused from doing so by the petitioner.

Without discussing the evidence, the Court of Appeals held that the trial court's finding that respondent was ready, able and willing to perform the contract was not clearly erroneous (R. 103).

The Court of Appeals also approved without discussion the choice of June 26, 1946, as the date for computing the respondent's alleged loss of profits and the allowance of interest thereon (R. 105).

The dissenting opinion of Judge Kerner, the senior of the judges who heard the case in the Court of Appeals, was short enough to quote here in full (R. 105):

> "I regret I am unable to agree with the majority. The defendant's offer to sell the milk to plaintiff expressly stated that 'this offer is subject to the government's acceptance for export * * *.' The government's approval for export was therefore a condition precedent, the procurement of which was essential before the offer could be accepted by a promise. The government never approved the milk for export. Consequently there was no contract between the parties.
>
> "I would reverse the judgment."

There are six judges of the Court of Appeals for the Seventh Circuit (28 U. S. C. Sec. 44(a)). On June 30,

1950, two weeks after the opinion was rendered in the instant case by a division of the court consisting of Circuit Judges Kerner, Finnegan and Swaim, another division of the same court composed of Major, Chief Judge, and Circuit Judges Duffy and Finnegan handed down an opinion in Gen. No. 9985, *Victory Cabinet Co.* v. *Insurance Co. of North America,* 183 F. 2d 360 (C. A. 7) not yet reported, which followed and applied the Illinois rule strongly urged by us in the instant case that "performance must never be averred by a party who relies upon an excuse for not performing, but he must state his excuse" (*Hart* v. *Carsley Mfg. Co.,* 221 Ill. 444), quoted in *Feder* v. *Midland Casualty Co.,* 316 Ill. 552 (1925). This opinion has become final. This conflict between decisions was called to the attention of the Court of Appeals by additional suggestions in support of petitioner's motion filed June 30, 1950 (R. 106) for a rehearing of the instant case in banc. No order was entered by all of the judges on the petitioner's motion, although we treat the inaction which resulted in leaving the instant case for final decision by the original three judges, one of whom dissented, as equivalent to a denial of the motion for a rehearing in banc.

On August 10, 1950, Circuit Judges Swaim and Finnegan denied our petition for a rehearing, with Circuit Judge Kerner voting to allow it (R. 121).

Specification of Errors.

The Court of Appeals erred in holding:

(1) that the Rules of Civil Procedure authorized the entry of judgment against petitioner on an Illinois cause of action for anticipatory breach of a sales contract, although the constitutive elements of that cause of action were neither alleged nor proved.

(2) that the unpleaded cause of action for anticipa-

tory breach of contract was an issue "tried by express or implied consent of the parties" within the meaning of Rule 15 (b) of the Federal Rules of Civil Procedure.

(3) that the requirement of an export license was not a condition precedent to the formation of a contract of sale, but was only an element of performance of the contract which, moreover, was excused by petitioner's insistence on OPA approval of a price which it feared was overceiling.

(4) that the date of the petitioner's second repudiation of the contract, not the first, could be selected by the respondent as the date on which damages were assessable for anticipatory breach of contract, thereby increasing the amount of the judgment.

(5) that the judgment of the District Court should be affirmed.

Reasons for Granting the Writ.

Summary.

I. In affirming a judgment on a cause of action concededly not pleaded, the Court of Appeals applied Federal Rules of Civil Procedure not heretofore passed upon by this Court in a manner that deprived the petitioner of a constitutional right to be heard on the issues upon which the judgment is based. The purpose of pleading is to advise the litigants what issues they must meet. The application of Rule 15 (b) by the Court of Appeals in the instant case to sustain an unpleaded cause of action for anticipatory breach of contract (which excused performance), although the complaint alleged completed performance, turns a rule intended to be in furtherance of justice into an instrument of injustice. Under the substantive law of Illinois, a cause of action for anticipatory breach is wholly dissimilar from a cause of action alleging performance.

On this point, the decision in the case at bar is in conflict with *Victory Cabinet Co.* v. *Insurance Co. of North America,* 183 F. 2d 360 (C. A. 7, June 30, 1950), decided by another division of the same Court of Appeals two weeks after the instant opinion was handed down. The petitioner did not consent to the trial of the unpleaded cause of action within a proper interpretation of Rule 15 (b). Even disregarding the fatal defect in pleadings, the elements of an Illinois cause of action for anticipatory breach of contract were not proved in this case, *i. e.,* that the respondent was able to procure an export license and open a letter of credit called for by the offering letter, and that except for the repudiation of the offer by the petitioner the respondent would have fully performed the contract on its part.

II. In holding that procurement of government acceptance for export was not a condition precedent to acceptance of petitioner's offer to sell 60,000 cases of evaporated milk, a majority of the judges hearing this case in the Court of Appeals disregarded the plain language of the offer and ignored the canons of construction laid down by the Supreme Court of Illinois, which canons are controlling in a case wherein Federal jurisdiction is based on diversity of citizenship, as in the present case.

III. The Court of Appeals approved a wrong measure of damages for anticipatory breach of contract in permitting the respondent to select June 26, 1946, the date of the second disavowal by petitioner of its offer, as the date upon which to calculate damages, instead of requiring the calculation to be made as of June 7, 1946, the date which the trial court found was the first repudiation of the petitioner's contract to sell 60,000 cases of evaporated milk. On respondent's theory its damages were $48,150 on June 7th and $72,300 on June 26th (R. 35-36).

I.

The Court of Appeals Erroneously Construed Rules 7(a), 8(d) and 15(b) of the Rules of Civil Procedure to Sanction Entry of a Judgment Against Defendant Without Notice of the Cause of Action Supposedly Supporting the Judgment and Without Evidence of the Constitutive Elements of That Alleged Cause of Action.

The offer in the case at bar was made by letter mailed from Chicago, Illinois, and purportedly accepted by telegram, a different mode of communication (Plt. Exs. 1, 2, R. 62-63), so that the contract, if any, was made in Illinois. The alleged contract was to be performed in Illinois, *i. e.*, delivery was to be made at defendant's plant at Pecatonica, Illinios (Plt. Ex. 1, R. 62, 55). That the constitutive elements of a cause of action sounding in contract and that the existence and enforceability of the agreement are to be determined by the law of the State in which the agreement is made and to be performed is clear from a long line of cases of which *Mutual Life Ins. Co.* v. *Cohen*, 179 U. S. 262 (1900) and *Selover, Bates & Co.* v. *Walsh*, 226 U. S. 112 (1912) are good examples.

The Supreme Court of Illinois holds that an action for anticipatory breach of contract is an entirely different cause of action from an action for accomplished breach of contract. In an action for anticipatory breach or repudiation of a contract, the plaintiff must allege and prove that plaintiff was *able* to perform conditions precedent and that the repudiation of the contract by the defendant was the *cause* of non-performance of such conditions. In an action for accomplished breach of contract, plaintiff must allege and prove actual performance of conditions precedent. A complaint which alleges that plaintiff performed conditions precedent states an altogether different cause of action

from a complaint which alleges that plaintiff was excused from performing conditions precedent by the conduct of defendant. (*Feder* v. *Midland Casualty Co.*, 316 Ill. 552 (1925); *Hamilton Co.* v. *Channell Chemical Co.*, 327 Ill. 362 (1927); *Henderson* v. *Wheaton*, 139 Ill. 581 (1891); *City of Peoria* v. *Construction Co.*, 169 Ill. 36 (1897); *Tichenor* v. *Newman*, 186 Ill. 264 (1900).)

The Illinois rule is universally applied on the ground that a plaintiff who is unable to establish that he would himself have been able to perform on the due date, except for repudiation by defendant, has failed to prove damage, since if plaintiff would have been unable to perform, it is immaterial that defendant did not perform. See particularly *Petersen* v. *Wellsville City*, 14 F. 2d 38 (C. C. A. 8, 1926), where the cases are collected* and also the following texts:

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*In the *Wellsville* case the Court said (p. 39):

"The covenants of the city to pay the plaintiffs in error for this work and their covenant to perform the work were mutual and dependent. *Neither party to such a contract can maintain an action against the other party for loss of profits caused by a repudiation of the contract before the time for performance had arrived unless he pleads and proves that he would have been ready and willing to have performed the contract, if the repudiation had not occurred. Darland* v. *Greenwood*, (C. C.) 2 F. 660, 661; *Neis* v. *Yocum* (C. C.) 10 F. 168, 170; *Kent* v. *Addicks*, 126 F. 112, 114, 60 C. C. A. 660; *Weed* v. *Lyons Petroleum Co.* (D. C.) 294 F. 725. 732; *Gray* v. *Smith*, 83 F. 824, 829, 28 C. C. A. 168; *Hampton* v. *Speekenagle* (Pa.) 9 Serg. & R. 212, 222, 11 Am. Dec. 704; *Bigler* v. *Morgan*, 77 N. Y. 312, 318; *Wells Fargo & Co.* v. *Page*, 48 Or. 74, 80, 82 P. 856, 3 L. R. A. (N. S.) 103; Williston on Contracts, §882.

"*It is quite obvious that, if a contractor who agreed to furnish labor or materials would not have been able to have performed his part of the contract, he suffers no injury in loss of profits because the other contracting party refused to proceed with the contract.*" (*Italics ours.*)

Restatement of the Law of Contracts, pars. 306, 315, and 3 Williston on Contracts (Rev. ed., 1936) pars. 676, 677.

The rule is stated thus in Restatement of Contracts, par. 315 (2):

> "Acts that would have been sufficient to prevent the occurrence of a condition or the performance of a return promise are not a breach of contract if the condition would not have occurred or the return promise have been performed had these acts not been done."

See also 3 Williston on Contracts, par. 677 (Rev. ed., 1936) where the author says:

> "If the promisee could not or would not have performed the condition, or it would not have happened whatever had been the promisor's conduct, the condition is not excused."

The complaint in the case at bar a leged performance of conditions precedent. The answer denied such performance and, in conformity with the provision of Rule 9 (c) of the Rules of Civil Procedure that a denial of performance or occurrence of conditions precedent shall be made specifically and with particularity, averred that plaintiff had neither procured an export license nor opened a letter of credit (R. 6-7). The purpose of pleading is to form an issue of fact so that the litigants may, thus apprised of the question to be adjudicated, marshal their evidence in support of the affirmative and negative of that issue. The *denial* by defendant of the performance of conditions precedent by plaintiff created such an issue of fact.

The Court of Appeals, however, held that Rules 7 (a) and 8 (d) of the Rules of Civil Procedure apparently operated in some unexplained manner to create a different issue of fact. Rule 7 (a) provides that a reply to an answer will not be allowed except when ordered by the trial court. Rule 8 (d) provides that averments in a pleading to which

no responsive pleading is required or permitted shall be taken as denied or avoided. Neither Rule 7 (a) nor Rule 8 (d) has any conceivable application here, for the reason that the office of a reply is either to deny or to confess and avoid new matter or affirmative defenses pleaded in the answer. There was no occasion whatever for a reply by plaintiff in the instant case, since no pleading is designed to deny a denial nor to plead in avoidance of a denial in an earlier pleading. Therefore, Rules 7 (a) and 8 (d) have no application here, and the Court of Appeals was clearly wrong in holding that they do.

The erroneous conception of Rules 7 (a) and 8 (d) caused the Court of Appeals to misconceive the impact of Rule 15 (b) in this case. The only question which that Court should have considered was whether under Rule 15 (b) defendant expressly or impliedly *consented* to the trial of the unpleaded issue of plaintiff's ability to procure an export license and to open a letter of credit. The defendant did not consent to trial of such issues. As noted above (pp. 10-12), defendant's counsel repeatedly objected to inquiry into the matter at the trial (R. 46-47). The trial judge sustained each of those objections (R. 46-47). The trial judge expressly stated that he did not see how ability to perform conditions precedent was material (R. 47). The only evidence in the record touching such ability is the statement volunteered by plaintiff's president on cross-examination that it was "entirely impossible" to procure an export license in May or June, 1946 (R. 47). This is a concession of inability to perform at least one of the conditions required by the offer.

Nor can the erroneous assumption of the trial judge that defendant said that plaintiff was able to open a letter of credit take the place of evidence of such ability (R. 47). Moreover, the statement of defendant's trial attorney (in

answer to the inquiry of the trial judge) that "I don't know anything about this man's financial condition but we were not in any condition to go forward until they met our terms in regard to the license and the letter of credit" and that "he might have been able to procure them" were merely concessions, not of any facts, but of lack of knowledge of what the facts were (R. 47). Since such ability had not been put in issue by the pleadings, there was no occasion for defendant's counsel to inform himself on the matter. Had such ability been an issue in the case, defendant's counsel would have been able by pre-trial deposition to ascertain plaintiff's financial condition and whether plaintiff could have procured an export license from the Office of International Trade. Because those vital factors were not issues in the case under the pleadings, no such investigation was undertaken or even considered. The Court of Appeals did not say that the admission of ignorance by defendant's counsel as to plaintiff's ability to perform conditions precedent meant that defendant waived such proof. If that Court did consider the discussion between court and counsel as dispensing with proof (occurring as it did in the midst of vigorous objections to evidence) or as consent to the trial of unpleaded issues within the meaning of Rule 15 (b), then we submit that this represents as serious a misunderstanding and misapplication of that rule as the majority opinion exhibits with respect to Rules 7 (a) and 8 (d), which do not have any possible application to this case.

In *Pennsylvania Casualty Co.* v. *Miller*, 145 F. 2d 292 (C. C. A. 7, 1944), cited by the Court of Appeals (R. 104), the opinion expressly stated (p. 293): "Although the appellant did not plead this defense in her answer, *the matter was investigated at the trial without objection.*" In our case, objection was vigorously made by the defendant and was sustained to evidence on the issue now claimed to have been tried with the defendant's consent.

All of the cases construing Rule 15(b) limit the applicability of the rule to those instances where, as stated in *Maruska* v. *Maruska,* 155 F. 2d 302 (C. C. A. 7, 1946), all that is needed is an amendment to the pleadings to bring them "in line with the actual issues upon which the case was tried."

Thus, in *Low* v. *Davidson Mfg. Co.,* 113 F. 2d 364 (C. C. A. 7, 1940), the complaint pleaded a contract which the answer alleged had been modified. A pre-trial order put in issue the contract as modified and evidence with respect thereto was admitted on the trial without objection. This was held sufficient to imply consent to the trial of the issue and to support a judgment. In *El Paso Electric Co.* v. *Surrency,* 169 F. 2d 444 (C. C. A. 10, 1948), implied consent to the trial of an issue not raised in the complaint was rested solely on the ground that the unpleaded cause of action upon which recovery was allowed was supported exclusively by evidence adduced by the defendant. In *Vernon Lumber Corp.* v. *Harcen Construction Co.,* 155 F. 2d 348 (C. C. A. 2, 1946), implied consent to the trial of an unpleaded affirmative defense to a counterclaim was based upon the admission of counterclaimant's counsel at the trial that this was one of the major defenses to the counterclaim. Also, evidence in support of the defense was received without objection. In *Franklin* v. *Columbia Terminals Co.,* 150 F. 2d 667 (C. C. A. 8, 1945), the defendant was deemed impliedly to have consented to the trial of an issue not set up in the complaint only because both parties, without objection, introduced evidence on the subject. In *United States* v. *Cushman,* 136 F. 2d 815 (C. C. A. 9, 1943), the introduction of evidence by plaintiff, without objection by defendant, on the subject of fraud not alleged in the complaint was for that reason held to amount to implied consent to trial of the issue. In *Pearl Assurance Co., Ltd.* v. *First Liberty National Bank.* 140 F. 2d 200

(C. C. A. 5, 1944), both parties without objection introduced evidence on an unpleaded issue of waiver of certain conditions in a fire insurance policy and this was held to imply consent to the trial of the issue.

As we have shown above, there was neither express nor implied consent by defendant to the trial of any issues other than those formed by the complaint and answer. Objection was consistently made throughout the trial (and sustained) to the introduction of evidence not within the issues made by the pleadings.

Nor did defendant "waive" proof of ability to perform conditions precedent. The only reference to "waiver" occurs in a purported transcript of a colloquy between the trial judge and defendant's counsel with respect to defendant's letter of May 28, 1946 (R. 64-65), which colloquy does not appear in the trial court record, but was nevertheless set forth in plaintiff's objections (R. 117-118) to defendant's motion for a rehearing by the Court of Appeals in banc. The trial judge is there reported as saying that the request by defendant for OPA authorization and the statement by defendant that such authorization was even more important than the letter of credit said in effect that "unless you get this permit from the OPA, you need not worry about the letter of credit." Defendant's counsel denied that the letter in question was susceptible of any such construction and pointed out to the trial judge that the letter could not be construed as a "waiver" of anything, since defendant specifically stated in the letter that defendant could not take any chances of shipping without the letter of credit or the export license (R. 117). Obviously, denial by defendant's counsel in a colloquy with the trial judge that defendant's letter of May 28, 1946, waived the opening of a letter of credit and procurement of an export license is neither *consent* to the trial of an unpleaded issue of "waiver" nor the *trial* of such an issue.

The purported excerpts (R. 118) from affidavits of plaintiff's president (which were not in the trial court record) could not have influenced the opinion of the Court of Appeals in finding that defendant consented to the trial of unpleaded issues. Furthermore, such statements during a prior summary judgment proceeding, could not and did not alter the issues which were later tried.

Under the pleadings, defendant had no reason to believe at the time of trial that plaintiff's *ability* to open a letter of credit and to procure an export license had any bearing on the case and consequently defendant's counsel was not prepared to try that unpleaded issue. As a matter of fact, we were completely unaware that such *ability* was supposedly an issue until, long after the trial, the trial judge filed a memorandum stating that judgment should be entered for plaintiff and that plaintiff had proved that it was ready, willing and able to comply with the alleged contract (R. 73). There is neither pleading nor evidence to support this finding.

The Court of Appeals has affirmed a judgment against defendant without warning of the cause of action asserted by the plaintiff and without defendant being given an opportunity to try the cause of action upon which the judgment is supposed to rest. This is clearly contrary to the plain mandate of Rule 15(b) and stamps the judgment sought to be reviewed as wholly unjust and inequitable. In so holding, the Court of Appeals has manufactured a fictitious issue in the pleadings in consequence of a complete misunderstanding of the nature and purpose of Rules 7(a) and 8(d), which have no conceivable application to this case, and has deprived defendant of due process of law. The guaranty of due process of law in the Fifth and Fourteenth Amendments to the federal constitution and in section 2 of Article II of the Illinois constitution of 1870 applies to civil proceedings and to judicial, as distinguished from legislative, action affecting such pro-

ceedings. (*U. S.* v. *Carolene Products Co.*, 304 U. S. 144 (1937); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 (1929); *People* v. *Niesman*, 356 Ill. 322 (1934).) One of the essential elements of due process of law under both the federal and Illinois constitutions is an opportunity to be heard and to adduce evidence, and an adjudication against a litigant without a hearing on and determination of questions of fact necessary to fix liability is a deprivation of due process. (*Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 (1929); *Burket* v. *Reliance Bank & Trust Co.*, 367 Ill. 196 (1937).)

The adjudication of fictitious questions of fact adversely to defendant is thus a violation of a fundamental guarantee of the judicial process which the Court of Appeals refused to discuss or to remedy and which that court palliated by vague references to the "entire record" and the "issues which were tried and decided" (R. 104). This is a perversion of Rule 15(b).

The Court of Appeals in affirming that judgment has also decided that a plaintiff may recover for anticipatory breach of contract without proof of *ability* to perform conditions precedent and without proof that the *cause* of non-performance by the plaintiff was repudiation of the contract by the defendant. This holding is in clear conflict with Illinois law, since it sanctions recovery of damages without proof of a cause of action.

Substantive matters are governed by state law and not by the Federal Rules of Civil Procedure. *Palmer* v. *Hoffman*, 318 U. S. 109 (1942). The *Palmer* case held that the burden of proving freedom from contributory negligence rested on the plaintiff, despite the fact that Rule 8(c) of the Rules requires the defendant affirmatively to plead that defense. That decision means here that the respondent was obligated to prove a cause of action in contract under state law in spite of Rule 15(b) of the rules of civil procedure.

The holding in the instant case is also utterly at variance with *Victory Cabinet Company* v. *Insurance Company of North America*, 183 F. 2d 360 (C. A. 7) decided by another division of the Court of Appeals for the Seventh Circuit. There, as here, the complaint, which sought recovery for breach of certain insurance policies, alleged performance of conditions precedent. There, as here, plaintiff conceded that conditions precedent had not been performed, but contended that recovery should be permitted because of supposed waiver by defendant of performance of such conditions. Contrary to the conclusion reached in the instant case, the Court rejected the contention that supposed waiver supported an allegation of performance, relying for this result on certain of the Illinois cases also cited by us, but which the majority of the Court here held not to be controlling because of incompatibility with the Federal Rules of Civil Procedure. Judge Finnegan (Chief Judge Major and Circuit Judge Duffy, concurring) said in the *Victory Cabinet* case:

> "In *Feder* v. *Midland Casualty Co.*, 316 Ill. 552, an accident insurance case, it was held that when a plaintiff alleged in his complaint that he had performed all the conditions precedent required of the plaintiff to be performed by the insurance policy involved, he would not be permitted to show a waiver of conditions on the part of the defendant. The true rule is said to be found in *Hart* v. *Carsley Mfg. Co.*, 221 Ill. 444, where it is said:
>
> " 'Though an excuse for not performing a condition is for some purposes equivalent to performance, yet it is not the same thing, and therefore, in pleading, *performance must never be averred by a party who relies upon an excuse for not performing, but he must state his excuse.*' "

This conflict between divisions within the Court of Appeals for the Seventh Circuit is an additional reason for the exercise of this Court's power of review.

II.

The Defendant's Offer Was Not Accepted by Plaintiff, Because the Offer Was Subject to Government Acceptance for Export Which Was Not Obtained.

A question of the meaning of simple language—"*this offer* is subject to"—is presented. The Court of Appeals held that the quoted clause means something equivalent to "performance of any contract hereafter entered into is subject to." In order to reach this result, the Court of Appeals was required to ignore elementary rules of rhetoric and grammar and to disregard the controlling decisions of the Supreme Court of Illinois with respect to the interpretation of written instruments.

Even a cursory reading of defendant's letter discloses an intention that the effectiveness of the offer—as an offer—*was conditional upon the government's acceptance for export to Europe.*

The first paragraph of the letter is clear (R. 62):

> "We are very much interested in helping to feed the nations of Europe who are in dire need of food stuffs. We offer you 60,000 cases Evaporated Milk for reasonably prompt shipment after confirmed letter of credit has been opened, for $4.55 per case, F. O. B. Factory, net cash, packed in export double strapped solid fibre cases."

The Court of Appeals' confusion stems from the balance of the letter, which we now examine in detail.

"*This offer* * * *." The Court of Appeals held that the demonstrative pronoun "this" does not refer to the offer set forth in the antecedent paragraph and that the word "offer" in the phrase "this offer" really signifies something such as "performance of any contract hereafter entered into".

"* * * *is subject to the government's acceptance for export* * * *.*" These words mean that the offer is *conditional* upon approval for export by the Office of International Trade of the Department of Commerce. Yet the Court of Appeals held squarely that the offer is *not subject to* the government's acceptance for export.

"* * * *and if a permit is issued for us to ship on above basis* * * *.*" This language says even more definitely that the offer for export is *contingent* upon the issuance of an individual export license. Nevertheless, the Court of Appeals held that the offer was accepted by a mere promise and that it was immaterial to an acceptance of the offer whether a permit was issued.

"* * * *we will try to get you additional quantities at that time* * * *.*" Although this statement clearly refers to *the time when the export permit should be issued,* the Court of Appeals held that the offer could be accepted by a promise *before that time.*

"*These additional quantities will possibly be well in excess of the above amount on which we are giving you a firm offer today.*" The Court of Appeals infers that the words "firm offer" as used in this sentence are inconsistent with our contention that the firm offer was conditional upon the issuance of an export license. There is no such inconsistency. The immediately preceding sentence had said that if an export permit was issued, defendant would try, at the time of such issuance, to get plaintiff additional quantities. In this sentence, defendant says that the additional quantities themselves may be in excess of 60,000 cases (the "above amount" described in the first paragraph of the letter) and the use of "firm offer" refers to the *amount* or *quantity* of 60,000 cases as being definite and certain, despite the fact that the "additional quantities" on which the offer is not firm, but is

merely prospective, are uncertain. The Court of Appeals did not understand that this sentence was concerned with the *quantity* of evaporated milk that might ultimately be available but seized upon the words "firm offer" to nullify the explicit statement in the immediately preceding sentence that "*this offer* is subject to the government's acceptance for export * * *." The offer was firm, but was subject to its own express terms.

"*This tender is made with the understanding we are to have a firm reply within two weeks from this date.*" The Court of Appeals held that the use of the words "firm reply" eliminated the previously stated express condition of paragraph two, that the offer itself was subject to the government's acceptance for export. Because defendant asked for a "firm reply", the Court of Appeals held that *all* the defendant's letter asked for was a promise and that the condition that "this offer is subject to * * *" should be translated to mean "performance of any contract hereafter entered into is subject to * * *" and, in effect, should be transposed to the first paragraph of the letter as a condition precedent to performance of a resulting contract along with the letter of credit. The "firm reply" or acceptance requested by defendant is entirely compatible with an offer which, to be effective and susceptible of acceptance, was subject to the issuance of a permit for export.

The purpose of the letter is clear. The defendant sought to sell evaporated milk for export to Europe. Whether the milk could be exported was problematical because of the fact that an individual license from the Office of International Trade of the Department of Commerce was required for export. The defendant, therefore, made the offer conditional upon the issuance of such license. The Court of Appeals excised the condition from

the offer and thereby made a contract for the parties without subjecting the offer to the condition which the language of the offer imposed.

Since the meaning of defendant's letter is obvious and unambiguous, there is no room for "construction", which denotes or at least implies an uncertainty of meaning. A court should not resort to construction where the intent expressed in a writing is clear and evident. (*Joseph* v. *Carter,* 382 Ill. 461 (1943); *Slezak* v. *Fleming,* 392 Ill. 387 1946).) Nevertheless, the Court of Appeals said that "recognized rules of construction on such a question would require us to construe this offer as calling for a bilateral contract" (R. 100) and for this reason concluded that defendant's offer was not subject to the government's acceptance for export and that *all* the offer called for was a promise. There is here no actual question of bilateral *vs.* unilateral contract. Concededly, if there was to be a contract, the contract would be a bilateral contract, that is, a contract accepted by plaintiff's promise. The issue in the case, however, is whether "the government's approval for export was * * * a condition precedent, the procurement of which was essential *before the offer could be accepted by a promise",* as correctly noted in the dissenting opinion of Circuit Judge Kerner (R. 105). The reliance of the Court of Appeals on an inapplicable rule misled that Court into reaching a result not consistent with Illinois cases on the question of construction of contracts.

The Court of Appeals specifies no other "recognized rules of construction." However, were there any uncertainty as to the meaning of defendant's letter, the following canons of construction laid down by the Supreme Court of Illinois clearly establish that defendant's *offer* was subject to the government's acceptance for export:

(a) The first of such canons of construction is that all

of the terms of a written instrument will be given effect if possible for the reason that parties do not ordinarily insert meaningless terms therein. In *Weger* v. *Robinson Nash Motor Co.*, 340 Ill. 81 (1930), the Court said (p. 92):

> "In construing a contract it is our duty, if possible, to give effect to each clause, phrase and word used therein, and we must presume that the contracting parties meant something by the use of the particular language used by them."

Green v. *State Bank*, 346 Ill. 174 (1931) and *Sanitary Dist. of Chicago* v. *United States Fidelity & Guaranty Co.*, 392 Ill. 602 (1946), state the same rule. It is possible to give effect to the words "*this offer* is subject to * * *" in the case at bar by holding, as the dissenting judge did, that an export permit was a condition precedent to a valid acceptance of the offer. Nevertheless, the Court of Appeals refused to give effect to this language.

(b) Another Illinois canon of construction is that the manifested intention will, if possible, be ascertained from the terms used. In *Decatur Lumber Co.* v. *Crail*, 350 Ill. 319 (1932), the Court said (pp. 323-324):

> "The object of construction is to ascertain the intention which the parties have expressed in the language of the contract."

Green v. *Ashland State Bank*, 346 Ill. 174 (1931), is to the same effect. The intention of defendant in stating that "*this offer* is subject to * * *" may be ascertained from that language. Yet the Court of Appeals held that defendant's expressed intention was not ascertainable from that language, and then relied upon other portions of the offer to thwart the meaning of the words just quoted.

(c) A further Illinois canon of construction is that words cannot be added to or taken from an instrument to change the meaning of the parties as expressed in the lan-

guage used. In *Decatur Lumber Co.* v. *Crail,* 350 Ill. 319 (1932), the Court said (p. 323):

> "No words can be added to or taken from an instrument and thereby change the plain meaning of the parties as expressed therein."

Stevens v. *Felman,* 338 Ill. 391 (1930), and *Fuller* v. *Fuller,* 315 Ill. 214 (1925), state the rule in similar language. Despite this rule, the Court of Appeals in effect removed the words "*this offer*" from defendant's letter and substituted "performance of any contract hereafter entered into" in order to change the plain meaning of the letter.

(d) An additional Illinois canon of construction is that provisions may not be incorporated into a writing in order to create a contract or a new contract for the parties. In *Chicago Title and Trust Co.* v. *Robin,* 361 Ill. 261 (1935), the Court said (p. 267):

> "This court does not have the power to import into a contract other or additional provisions. To do so would be making a new contract for the parties (*Burt* v. *Garden City Sand Co.,* 237 Ill. 473)."

The Court of Appeals, however, took to itself the power to make a contract for the parties in the case at bar by holding that defendant's *offer* was *not* subject to the government's acceptance for export and that the offer might be accepted without performance of that condition precedent.

(e) A further Illinois canon of construction is that in the absence of clear proof to the contrary, words will be given their ordinary and usual meaning. In *Beardstown* v. *Virginia,* 76 Ill. 34 (1875), the Court said (p. 40):

> "* * * contracts should be read and understood according to the natural and most obvious import of

> the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation."

And in *Gabel Mfg. Co.* v. *Murphy,* 390 Ill. 455 (1945), the Court said that (p. 459):

> "The language used must be given its common, everyday meaning. Nothing can be added to nor taken from it to ascertain what the parties intended."

Nevertheless, the Court of Appeals held that the language in defendant's letter that *"this offer"* [meaning the offer set forth in the preceding paragraph of the letter] "is subject to the government's acceptance for export * * *" would not be given its "common, everyday" meaning and resorted to "subtle and forced construction" to change the condition from one which applied to the offer to a condition that applied only to the performance of a contract held to result from a mere promise "accepting" the offer.

(f) Another Illinois canon of construction is that a word used in one part of an instrument will be deemed of the same meaning in another part. In *Cemetery Association* v. *Village of Calumet Park,* 398 Ill. 324 (1947), the Court said (p. 334):

> "Unless a contrary intent is evident, words used in one sense in one part of a contract are deemed of like significance in another part. *Chicago Home for Girls* v. *Carr,* 300 Ill. 478, 13 C. J. 532 and cases therein cited."

The Court of Appeals recognized that the word *offer* as used in the first paragraph of defendant's letter meant *offer.* Contrary to the canon of construction just quoted, the Court of Appeals held that *"this offer"* used in the second paragraph of the letter neither referred to the offer in the first paragraph nor, in fact, meant *offer* at all.

(g) Finally, there is an Illinois rule of construction that assistance in ascertaining the meaning of doubtful language may be sought from the conduct of the parties. In *Pioneer Ins. Co.* v. *Alliance Ins. Co.*, 374 Ill. 576 (1940), the Court said (p. 590):

> "Where the terms of an agreement are in any respect ambiguous and the parties have by their own acts placed a reasonable construction upon them, their interpretation will be adopted by the court. (*Chicago Daily News, Inc.* v. *Kohler*, 360 Ill. 351; *Slack* v. *Knox*, 213 Ill. 190)."

The plaintiff did not acknowledge defendant's offering letter of May 16 until May 25, nine days later. In that letter plaintiff's president said that "I am *trying* to have a few export licenses cleared * * * *so that we can ship some milk abroad*" (R. 68). This clearly shows that plaintiff interpreted defendant's offer to be subject to the government's acceptance for export. The Court of Appeals, however, said that this letter merely meant that plaintiff was "*investigating the possibilities*" of procuring government acceptance for export before plaintiff would bind itself to perform (R. 101). What plaintiff's president *said* was that he was "*trying to have a few export licenses cleared.*" He did not say that he was "investigating the possibilities". We submit that it is not "an equally reasonable interpretation" to conclude that plaintiff meant what it did not say.

The Court of Appeals also said (R. 102) that the defendant was not justified in believing that plaintiff had secured an export license when defendant received plaintiff's so-called acceptance telegram on May 27, 1946, two days after plaintiff had written defendant that plaintiff was "trying to have a few export licenses cleared * * * so that we can ship some milk abroad." The natural conclusion for defendant to draw from receipt of an acceptance two days after plaintiff's statement that plaintiff was "trying" to

get export licenses was that plaintiff had gotten the licenses. Nevertheless, the Court of Appeals said that it would have been "just as reasonable" for defendant to conclude from this acceptance that "plaintiff had learned that, if and when plaintiff contracted for the purchase of the milk it would be able to procure the export licenses," despite the fact that plaintiff said nothing of the sort and despite the fact that there was no requirement by the Office of International Trade of the Department of Commerce that a potential exporter own or have a contractual interest in merchandise sought to be exported in order to obtain an export license, a *fact* of which federal courts take judicial notice.

The reliance by the Court of Appeals (R. 102) in interpreting the contract, on the failure of the witness, Dean, to testify on the trial as to his understanding whether an export license had been obtained when the telegram of May 27, 1946, was received, is erroneous (as we pointed out in our petition for rehearing), because the witness Dean, is the son of Sam E. Dean, deceased, who handled the transaction (R. 22-24, 54).

The Court of Appeals, in holding that defendant's offer might be accepted merely by a promise, disregards Illinois law and ignores the plain meaning of words.

The result reached by the majority of the Court of Appeals is also directly contrary to the result recently reached by the New York Court of Appeals in a closely analogous factual situation. In *F. W. Berk & Co., Inc.* v. *Derecktor,* ..... N. Y. ....., 92 N. E. 2d 914 (May, 1950) reversing 276 App. Div. 754, 92 N. Y. Supp. 2d 510, the court held that an acceptance "subject to * * *" was not sufficient to form a contract. There, the plaintiff wrote the defendant a letter to which defendant appended an acceptance as follows (pp. 914-915 of 92 N. E. 2d):

"We hereby order from you 1045 Flasks of Prime

Virgin Mercury, 99.5% Pure, 76 pounds net weight each, standard iron flash, at a price of $60.75 per flask, in bond, C. I. F. New York.

"We will establish immediately, in your favor, an irrevocable letter of credit, providing for payment against on board Bill of Lading, presented in New York.

"We will take care of any and all commission payments that may be due in this transaction to Wm. M. Stieh & Co., Inc. and agree to hold you harmless from any claims they may make in connection therewith.

"It is requested that you arrange for inspection certificates so that full weights and analysis as called for herein be assured and that these certificates be available along with the invoices, bill of lading, etc."

At the bottom of that letter, the defendant wrote and signed this sentence:

"We confirm that the above is our understanding of this agreement, and accept this order, subject to our arranging all the above phases of this transaction."

In holding that there was no contract because the "subject to" language prevented an unequivocal acceptance of the offer, a unanimous court, speaking by Chief Judge Loughran, said (p. 915 of 92 N. E.):

"The Justices who dissented from the affirmance by the Appellate Division apparently thought that the 'subject to' clause in the defendant's acceptance had been directed to every part of the plaintiff's order and not to the last paragraph thereof alone. Nothing turns on that issue, however; for if the acceptance was subject only to the defendant's arranging for the inspection certificates required by the last paragraph of the order, there was still no such absolute and unqualified assent to the plaintiff's proposal as was necessary to convert it into a promise. See *Schenectady Stove Co.* v. *Holbrook*, 101 N. Y. 45, 4 N. E. 4; *Poel* v. *Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 319, 110 N. E. 619,

622; *Wittwer* v. *Hurwitz*, 216 N. Y. 259, 264, 110 N. E. 433, 434; 1 Williston on Contracts (Rev. ed.) 72-73.

"The dissenting opinion of the Appellate Division defines the phrase 'subject to' as being the equivalent of 'conditional upon or depending on.' (276 App. Div. 754, 92 N. Y. S. 2d 510, 511). We agree."

In the case at bar, the majority of the Court of Appeals should have held that there was no effective offer capable of acceptance for the reason that the efficacy of the offer was "subject to" or conditional upon the prior governmental acceptance for export of the milk in question, which was never obtained.

III.

The Court of Appeals approved a wrong measure of damages for anticipatory breach of contract.

We preserve for possible later decision the point that the judgment in this case was increased by permitting the plaintiff to select June 26, 1946, instead of June 7, 1946, as the date to compute damages, and thus to increase such damages from $48,150.00 to $72,300.00, despite the fact that if there was an anticipatory breach of contract, that breach occurred when the offer was first disclaimed on June 7th. We refrain from arguing this point now because of the fact that this error is not of the character which would move the court ordinarily to grant certiorari.

Conclusion.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

FRED A. GARIEPY,
One North LaSalle Street,
Chicago 2, Illinois,
Attorney for Petitioner.

OWEN RALL,
135 South LaSalle Street,
Chicago 3, Illinois.

JOHN SPALDING,
One North LaSalle Street,
Chicago 2, Illinois,
Of Counsel.

September 14, 1950.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 308

DEAN MILK COMPANY,
Petitioner,

vs.

NATIONAL DAIRYMEN ASSOCIATION, INC.,
Respondent.

OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI.

GEORGE W. LENNON,
231 S. LaSalle Street,
Chicago 4, Illinois,

JAY STOUGH,
DANIEL M. SCHUYLER,
100 W. Monroe Street,
Chicago 3, Illinois,
Attorneys for Respondent.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

OPINION BELOW

Since the Petition for Certiorari was filed the opinion of the Court of Appeals in the case at bar has been reported as *National Dairymen Ass'n, Inc.* v. *Dean Milk Co.*, 183 F. 2d 349.

QUESTIONS PRESENTED.

Even were petitioner's contentions valid, which they are not, there does not appear to be any reason for granting the writ. The three questions presented,—stripped of petitioner's argument thereon (Pet. Cert. 2-3), —are:

1. Whether "the issues necessary to support the judgment of the District Court were tried and decided" (Pet. Cert. 10, R. 104).

2. Whether under Illinois law and the evidence there was a valid contract of sale between the parties.

3. When petitioner's breach of the contract occurred for the purpose of determining respondent's damages.

STATEMENT OF THE CASE.

Petitioner, Dean Milk Company, an Illinois corporation, was defendant in the District Court and will be referred to as defendant herein. Respondent, National Dairymen Association, Inc., a New York corporation, was plaintiff below and will be referred to as plaintiff herein.

The most glaring inaccuracies in defendant's "Statement of the Case" are its assertions that a recovery was permitted on an unpleaded cause of action for anticipatory breach of contract (Pet. Cert. 10) and that the issue of waiver was not litigated in the trial court (Pet. Cert. 10, *et seq.*). The facts are exactly opposite as pointed out in the following argument (4-15 herein). Other inaccuracies, and omissions, so far as important, will be referred to in our argument.

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

SUMMARY OF ARGUMENT.

I. There is no question involved of pleading, practice or procedure under the Federal Rules of Procedure.

(a) Judgment was rendered for the specific cause of action alleged in the complaint *viz.*, breach of the contract therein set forth.

(b) All matters decided by the District Court were within the issues raised by the pleadings, defendant had full previous knowledge thereof and they were either conceded or actually litigated.

(c) Neither during the trial nor in its Statement of Points did defendant suggest any question involving the Rules of Civil Procedure.

II. The unqualified acceptance by plaintiff of defendant's offer formed a contract between them.

III. The measure of damages was correctly determined as of the time plaintiff elected to treat defendant's repudiation as a breach and brought suit therefor.

I.

No question of pleading or procedure is involved. The cause of action for which judgment was entered was pleaded in the complaint. All issues decided by the Trial Court were actually litigated therein.

Although defendant asserts that the Court of Appeals erroneously construed some of the Rules of Civil Procedure (Pet. Cert. 18), what defendant is actually complaining about is not that court's construction of the rules, but that court's finding "that the issues necessary to support the judgment of the District Court were 'tried and decided'" (Pet. Cert. 10). In other words defendant is asking this court to review a factual question,—not a legal or procedural one.

The action at bar was brought by plaintiff for breach of contract for failure of defendant to deliver 60,000 cases of evaporated milk purchased from it by plaintiff. The contract consisted of a written offer from the defendant contained in its letter to plaintiff dated May 16, 1946 (copy attached to complaint as Ex. 1, R. 4) which was accepted by the plaintiff's telegram of May 27, 1946 (copy attached to complaint as Ex. 2, R. 5).

Paragraph 3 of the complaint was a general allegation of compliance by plaintiff with all terms and conditions (R. 3). (Proper pleading under Rules Civ. Pro. 9(c)).

The time for performance on the part of the plaintiff had not yet arrived when defendant breached the contract (Tr. Ct. Find. Pars. 5, 10, R. 73, 74). Therefore, the general allegations of compliance were strictly accurate since at the time of the breach plaintiff was no wise in default.

Defendant's assertion that the cause of action for which judgment was rendered was not pleaded (Pet. Cert. 16)

is a sheer misstatement of the facts. It embodies the erroneous assumption that a suit for anticipatory breach of contract is not a suit for a breach of contract.

The complaint in the case at bar sought damages for breach of the specifically pleaded contract (R. 2-4). Alleging the breach with perhaps more particularity than necessary, the complaint set forth not only that defendant had refused to deliver the 60,000 cases of milk but had repudiated the entire contract and told plaintiff it would not be bound by the terms thereof (Complt. Par. 4, R. 3). It was for this breach that damages were awarded (Tr. Ct. Find. of Fact, 10; R. 74; Tr. Ct. Concl. of Law 2, 3; R. 74-75).

Defendant's technical argument on this question of pleading is that because defendant breached the contract before the time for performance had arrived instead of afterwards, it is not liable for breach of contract. The Illinois cases are directly to the contrary. *Lake Shore & M. S. Ry. Co.* v. *Richards,* 152 Ill. 59, 89-90; *Kinnan* v. *Charles B. Hurst Co.,* 317 Ill. 251, 257. So is *Roehm* v. *Horst,* 178 U. S. 1.

Lake Shore & M. S. Ry. Co. v. *Richards,* 152 Ill. 59 is the leading Illinois case on when, before performance is due, a repudiation may be treated as a breach. It was there held that the plaintiff could elect to treat a repudiation of the contract as a breach and sue at once and that if he did, there was no necessity of his either performing or tendering performance on his part. In the course of the opinion, the Illinois Supreme Court said:

> " 'If he does so elect, it becomes a breach of contract, and he can recover upon it as such.' "
>
> "Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be regarded as then culminating, and the contractual

relation ceases to exist, except for purpose of maintaining the action for the recovery of damages." (152 Ill. 59, 90).

In the later case of *Kinnan* v. *Charles B. Hurst Co.*, 317 Ill. 251, it was said at Page 257:

"• • • This repudiation of the fundamental obligation of the contract completely deprived the assured of its benefit and was a waiver of the performance by the assured of the conditions precedent to a recovery of the amount it would be entitled to if those conditions had been performed.

"Where one party to a contract repudiates its obligation and declares his intention no longer to be bound by it, the other party may, if he thinks proper, treat the repudiation as a wrongful putting of an end to the contract and bring an action at once, in which he may recover damages *as for a present breach.*" (Italics ours)

In *Roehm* v. *Horst*, 178 U. S. 1, this court held that a repudiation of a contract, though the performance thereof was not yet due, could be treated as a complete breach entitling the injured party to bring his action at once. Mr. Chief Justice Fuller who delivered the opinion discussed English and Federal cases to that effect and then said (178 U. S. 16):

"The great weight of authority in the state courts is to the same effect, as will appear by reference to the cases cited in the margin".

The first cases cited in the margin were four Illinois ones including *Lake Shore & M. S. Ry. Co.* v. *Richards*, 152 Ill. 59.

It is submitted that this is respectable authority against defendant's contention that the Illinois Supreme Court holds an action for anticipatory breach of contract is a different cause of action than one for breach of contract. (Pet. Cert. 18).

Although defendant insists that there was a recovery based on waiver, in reality the recovery was based upon the defendant's repudiation of its contract, which repudiation the plaintiff elected to treat as a breach. Where there has been a repudiation of a contract before the time for performance arrives, the plaintiff, if he elects to treat the repudiation as a breach, may sue for damages and does not need to either aver or prove that he is ready, willing or able to comply with the terms of the contract. It is only in cases where the repudiation is not treated as a breach and the contract is kept alive by the plaintiff until the time for performance arrives that the plaintiff is required to aver or prove his ability to perform.

In *Mount Hope Cemetery Assn.* v. *Weidenman,* 139 Ill. 67, it was said on page 77:

> "The averment that the plaintiff has always been ready and willing to perform, was not intended to and does not show that the plaintiff was seeking to keep the contract obligatory on him after suit brought. Its purpose was accomplished in showing that the plaintiff was guilty of no default at the time of bringing his action * * * In such cases, the averment of readiness and willingness to perform is not an issuable averment." * * *

The Illinois doctrine is in accord with the general rule as set forth in 12 Am. Jur., "Contracts", Sec. 330, p. 886 where it is stated:

> "Where performance of a promise is a condition, performance of such condition is excused by repudiation by the other party, so that without performance of the promise an action may be maintained on the contract. A refusal by one party to perform obviates the necessity of performance or a tender of performance by the adverse party. The refusal to perform his covenants by one party to a contract founded upon mutual conditions will excuse a want of entire and absolute preparation by the other party. * * *"

The aforementioned case of *Lake Shore & M. S. Ry. Co.* v. *Richards,* 152 Ill. 59 is likewise authority against defendant's contention that after repudiation by defendant, plaintiff was bound to hold itself ready and able to perform and tender performance before bringing an action for the breach. On this score the Illinois Court said:

> "• • • And it was there held, following *Cort* v. *Railway Co., supra,* and other cases, that the conduct of the defendants amounted to an unqualified renunciation of the contract, and that after such renunciation it was no longer necessary that the plaintiffs should hold themselves in readiness to perform, or to go to the trouble and expense of offering what had already been refused. • • •
>
> "In these cases the holding was that under a contract containing mutual and dependent covenants, a refusal on the part of the defendant to perform obviated the necessity of performance, or tender of performance, on the part of the plaintiff, after such refusal." • • • (152 Ill. 59, 95).

Thus, even under the common law system of pleading existing in Illinois prior to 1934 defendant's argument on this point would not have been entertained.

Furthermore, the evidence which established the so called "anticipatory" breach was received without objection. When defendant's telegram of June 26, 1946 repudiating the contract was offered in evidence, defendant's lawyer expressly stated he had no objection to its admission (Pltf. Ex. 9, R. 67; R. 22).

It is this very telegram admitted without objection which constituted the breach of contract alleged in the complaint and for which recovery was had. (Tr. Ct. Find. of Fact 10, R. 74).

There was no requirement of OPA authorization in the contract. In insisting upon such a requirement, defendant was asking the impossible as the OPA did not approve or authorize any sales (R. 37). Indeed, defendant no longer contends that it was entitled to receive the OPA approval before shipping, although such was its assigned reason for refusing to go through with the contract, and such was its contention even as late as the trial (R. 117).

Pursuant to the Rules of Civil Procedure 7(a), no reply or other responsive pleading to the answer was filed. Under Rule 8(d) the averments in the answer concerning plaintiff's failure to perform the asserted conditions of the disputed contract were "taken as denied or avoided". One example of avoidance of non-performance of conditions is waiver or estoppel. Under common law pleading such avoidance would have been pleaded in a replication alleging that performance had been waived by the specified conduct of the defendant, etc., or that by reason of certain specified facts the defendant was estopped to rely on the non-performance of conditions.

Rule 8(d), however, has dispensed with the necessity of such a replication. Proof of avoidance of non-performance because of waiver or estoppel would therefore be within the issues raised by the complaint and answer in the case at bar.

Moreover, the very facts which constituted the waiver were alleged by defendant in its answer (Ans. Pars. 6, 8; R. 7, 8). The letters establishing the waiver had been set up by defendant itself in support of its motion for summary judgment. (Mr. Stough's statement, R. 16).

So far as the facts which proved waiver were concerned the defendant had full knowledge thereof prior to the trial since they were set forth by defendant itself both in its answer and motion for summary judgment.

Defendant's answer referred to a contemplated motion for summary judgment and affidavits in support thereof (Ans. Par. 13, R. 9-10).

This motion was subsequently made. In opposition thereto the affidavit of plaintiff's president was filed which, among other things, expressly stated that defendant "waived the requirement of the letter of credit being opened * * * and that an export license or permit be furnished and are estopped to say that they [the defendant] are not obligated to go through with their contract because no export license or permit was actually opened" (R. 118). This was advance notice that the evidence referred to in defendant's answer was relied upon by the plaintiff to establish waiver. It explains why when such evidence was offered by plaintiff upon the trial, defendant made no objection thereto "on the ground that it was not within the issues made by the pleadings". Had such an objection been made it would not have been well taken, but even had it been well taken, the court would have allowed the pleadings to be amended since the defendant could not have satisfied the court "that the admission of such evidence would prejudice it in maintaining its defense upon the merits" (Fed. Rules Proc. 15 (b), Pet. Cert. 4-5) when long prior thereto it had been advised that plaintiff was relying thereon.

Upon the trial one of the litigated questions was whether or not the conduct of the defendant amounted to a waiver. Defendant's counsel far from stating that he was unprepared on the matter and taken by surprise, argued,—not that the issues made by the pleadings were

not sufficiently broad to permit evidence of waiver,—but that plaintiff's evidence was insufficient to establish a waiver.

This is apparent from the following colloquy which took place between the trial judge and Mr. Gariepy (defendant's attorney), *viz.*:

"The Court: Let us assume that price was legal. Then you come along, after he has accepted it, and you say in addition to the other things, we want you to get the OPA authorization, and that is more important than the letter of credit.

Mr. Gariepy: We do not say we waive the letter of credit or the export license.

The Court: No, but you practically say that unless you get this permit from the OPA, you need not worry about the letter of credit. That is what that letter means to me.

Mr. Gariepy: No, it says further, in the third paragraph, that we cannot take any chances shipping without OPA authorization, an export license, and the letter of credit, so we ask for all three things in there, and we do not waive anything in there. We ask that all the things be settled first, and we cannot take any chances in shipping without them.

The Court: In the original offer, you only mention two things. Now, you make it three.

Mr. Gariepy: The original offer was $4.55; government acceptance for export; then a firm reply within two weeks, which we did not get.

The Court: There is nothing in the original letter that the $4.55 be approved by the OPA.

Mr. Gariepy: No. That is the f.o.b. price packed for export.

The Court: So far as the letter reads, you were asking for that price. So far as the testimony here is concerned, that is the legal price for your product.

> Now, you come along with an additional condition. You are asking him to do something which is impossible of accomplishment. If that was an essential of this contract, and it was impossible to do that which you ask him to do, it would be silly to go ahead with the rest of these propositions." (R. 117-118).

The reason for not including in the record to the Court of Appeals the motion for summary judgment, the foregoing colloquy (Pet. Cert. 24), and other proceedings, all of which showed both that the question of waiver was litigated and that no objection was made that the cause of action being tried was not embraced within the pleadings, is obvious. Defendant's present contention was not made in the trial court nor was any assignment, even suggesting it, made in the Statement of Points filed for appeal.

No procedural question of any sort was raised by defendant in the trial court. Defendant in taking its appeal from the District Court did not designate the complete record and so was required to and did serve with its designation a statement of the points upon which it intended to rely on the appeal, in accordance with Rules of Civil Procedure 75(d).* Not one of the points,—there were some twenty-three of them, mentions any error in connection with pleading, procedure or the Federal Rules of Civil Procedure (R. 79-82).

Since no such point was made as is argued in the Petition for Certiorari (18-27), there was no reason for the

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* Rule 75(d) of Rules of Civil Procedure:

"(d) Statement of Points. No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal."

plaintiff to even suspect that questions of pleading or procedure would be raised for the first time upon appeal. Therefore, there was no occasion to have the full record and proceedings taken to the Court of Appeals. The very purpose of Rule 75(d) is defeated if an appellant many designate less than a complete record and then argue upon appeal matters not raised or even suggested by his statement of points.

Moreover, not only is this whole question of pleading sought to be raised by defendant devoid of merit, but it is equally lacking in importance.

The asserted conflict on the question of pleading between different divisions of the Court of Appeals for the Seventh Circuit scarcely amounts to that. At least none of the six judges of that court thinks there is any conflict between the opinion in the case at bar and the one in *Victory Cabinet Company* v. *Insurance Company of North America,* 183 Fed. 2d, 360 relied upon by defendant (Pet. Cert. 17, 27). Judge Kerner who dissented from the majority opinion in the case at bar wrote a dissenting opinion expressly stating the grounds for his dissent. He did not dissent from the majority opinion on any question of pleading. (Pet. Cert. 14).

Judge Finnegan who wrote the opinion in the *Victory Cabinet Company* case concurred in the majority opinion in the case at bar.

The attention of all six judges of the Court of Appeals for the Seventh Circuit was called to this supposed conflict by defendant in its motion for a rehearing *in banc* (Pet. Cert. 15). No action was taken by the judges of the Court of Appeals on this motion. That court could not perceive any conflict between the decisions of its different divisions on the question of pleading involved.

Not only was the *Victory Cabinet Company* case filed in the Illinois state court instead of the U. S. District Court but the facts as found by the trial judge in the *Victory Cabinet Company* case were exactly opposite from those found in the case at bar. In the former case the trial judge found as a fact that "* * * there was never any denial of liability until after this suit was started and an answer filed in this case, nor that the defendants ever, at any time, did anything that amounted to a waiver of the filing of a proof of loss." (183 F. 2d 360, 364).

In the case at bar the trial judge found:

> "6. After May 27, 1946, when the contract was entered into and prior to its breach by the defendant as hereinafter found, the defendant by its course of conduct in insisting that plaintiff secure OPA approval of the contract waived any right it might otherwise have had to insist that plaintiff open a letter of credit or secure governmental acceptance of the milk for export; and plaintiff was accordingly excused by such conduct of the defendant from opening a letter of credit or securing governmental approval or acceptance for export on or before June 26, 1946." (R. 73).

See also Tr. Ct. Find. Par. 9, (R. 73-74) to the same effect.

Defendant made no point in its Statement of Points that these findings were not within the issues made by the pleadings or outside the issues actually litigated, but merely made the points that the court erred in finding the conduct of defendant constituted a waiver (Points 9 and 16, R. 80-81).

To repeat: defendant made absolutely no point in its required statement that the question of waiver and the court's findings thereon were neither within the issues made by the pleadings nor actually litigated (R. 79-82).

In view of this situation the Court of Appeals correctly found that the pleadings might be considered as amended to cover the issues which were tried and decided. Even so much of the record as was designated by the defendant showed that the question which its counsel disclaims having litigated was actually litigated (R. 19, 47). Further proof of this is found in the affidavit of plaintiff's president filed in opposition to defendant's motion for a summary judgment (R. 118) and the colloquy between the trial judge and defendant's counsel set out above on pages 11-12.

The opinion of the Court of Appeals decided a factual question rather than a procedural question adversely to defendant.

II.

There was a valid contract between the parties.

The contention of defendant that the offer and acceptance did not create a contract between the parties was made in the trial court. Indeed, it is the only contention of defendant made here that was also made upon the trial. Other contentions made by defendant in the district court and Court of Appeals are not urged in favor of granting the writ.

The original excuse of defendant for not performing,—that the contract was illegal because the price was over OPA ceilings (Pltf's. Exs. 3, 4, 7; R. 64, 65, 66), as well as the defense that a subsequent governmental set-aside order prevented defendant from performing have now been abandoned.

In view of this, all the discussion on pages 8-10 of the Petition concerning the validity of the price, and the alleged anxiety of defendant whether it had offered to

enter into a prohibited contract, seems out of place. The Finding of Fact of the trial court upon this subject* is not specified as error and would seem controlling.

(Incidentally, the defense of the set-aside order was not raised in the answer. Nevertheless, defendant introduced evidence thereon (R. 50-51, 54-60), it was passed upon by the trial judge (Tr. Ct. Find. 7, R. 73), whose finding, though assigned as error, (St. Points 12 & 13, R. 81) the Court of Appeals affirmed in its opinion (R. 103-104). The defense had been raised in defendant's overruled motion for summary judgment and so, though not mentioned in the pleadings, was quite properly investigated upon the trial.)

On this sole question presented here which was argued in the trial court, namely, whether there was a contract between the parties, the finding of the trial judge and the opinion of the Court of Appeals that there was, are obviously correct.

The acceptance by plaintiff of defendant's offer was the formation of a contract.

The principle of law involved is so well established that it is usually taken for granted. As said in *Geary* v. *Great Atlantic & Pacific Tea Co.*, 366 Ill. 625 on page 627:

> "The rule of law, accepted by counsel on both sides of this lawsuit, is, that a contract is ordinarily effected by offer and acceptance, * * *"

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* Tr. Ct. Find. Par. 4, R. 73

"4. On May 27, 1946, the date said contract was entered into, the maximum permissible price under OPA for such a sale was $4.70 and the contract price of the milk was within permissible OPA ceilings.

In the case at bar the acceptance of the offer was clear and unequivocal. The telegram of acceptance dated May 27, was:

> "This replies to your offer May 16 and to advise that we accept this offer of sixty thousand cases evaporated milk. Please advise delivery schedule." (Plt. Ex. 2, R. 5).

Here was certainly an acceptance of the offer. If it were not, it is hard to see how there ever could be one in any case. There is no clearer nor more definite way that plaintiff could have accepted defendant's offer than the way it did by writing in so many words that it accepted the offer.

Indeed, this acceptance is so clearly of the offer precisely as made, without any suggested modifications or variations, that defendant is forced to argue, not that there was no proper acceptance but that there was no offer which could be accepted. Let us see.

Unsolicited by plaintiff, the defendant on May 16th sent the plaintiff the following letter (Plt. Ex. 1, R. 62):

> "We are very much interested in helping to feed the nations of Europe who are in dire need of foodstuffs. We offer you 60,000 cases Evaporated Milk for reasonably prompt shipment after confirmed letter of credit has been opened, for $4.55 per case, F.O.B. Factory, net cash, packed in export double strapped solid fibre cases.
>
> "This offer is subject to the government's acceptance for export and if a permit is issued for us to ship on above basis, we will try to get you additional quantities at that time. These additional quantities will possibly be well in excess of the above amount on which we are giving you a firm offer today.

"This tender is made with the understanding we are to have a firm reply within two weeks from this date.

"This is all fresh packed milk guaranteed United States government standard in every respect".

Not only is the foregoing an offer to sell 60,000 cases of milk upon the terms therein set forth but it is apparent that defendant intended it to be such. The way the contract of sale was to originate was stated expressly in the offer, *viz.*:

"This tender is made with the understanding we are to have a firm reply within two weeks from this date."

Eleven days later, on May 27, plaintiff accepted the offer. The offer, it is true, set forth the terms upon which the defendant was willing to sell the milk if the offer was accepted. These were a confirmed letter of credit, $4.55 per case, including export packing, and government acceptance for export. Defendant argues that the provision in reference to government acceptance was not a term or condition of the sale but was a statement that only in the event the government would accept the 60,000 cases for export, was the defendant offering to sell. This argument not only violates the language of the offer but leads to the ridiculous and impossible situation that the government must accept milk for export before it is known whether it will be available for export,—since the offer could be withdrawn at any time before accepted. Under defendant's contention, before there could be any contract for the sale of milk for export the government must accept the very milk for export which defendant claimed it was under no obligation to sell even if the government did accept it for export, unless OPA authorization were obtained.

This is what plaintiff's president had in mind when he testified it would have been impossible to secure an export license in May or June, 1946 (R. 48-49). Obviously, in view of the position defendant was taking, this was so as to the 60,000 cases in question. Since the defendant was refusing to deliver them to the plaintiff, plaintiff could not even get them, let alone get a license to export them. That export licenses were being issued in May and June, 1946 was proven by the witness, Rutger Meyer, former head of Export—Import OPA (R. 45). That plaintiff could have secured governmental acceptance if the milk were forthcoming was obvious from plaintiff's president's testimony that he had purchasers from different parts of the world and could have sold it to, among others, the Department of Agriculture for UNRA (R. 50).

The defendant itself considered the requirement of government acceptance in the same category with the letter of credit,—not a condition precedent to the making of the offer, but one of the conditions or terms upon which defendant was willing and offering to sell. This is shown by the defendant's telegram the day after plaintiff's acceptance. In reference to plaintiff's request for delivery schedule, the defendant replied that it could ship 30,000 or 40,000 cases promptly, (without specifying dates), and said

> "Must have letter credit apply against railroad bills of lading also export permit license before loading * * * must have OPA authorization account over ceiling price". (Plt. Ex. 3, R. 64).

It is thus apparent that the defendant was only interested in getting an export permit license before loading,—not before contracting. Defendant considered itself under contract and obligated to sell the 60,000 cases. The provision about government acceptance had to do with the

delivery of the milk, *i.e.*, the performance of the contract, and had nothing to do with whether the defendant had made an offer.

The same day, May 28, defendant also sent a letter again recognizing that it was under contract to sell the milk. Said the defendant:

> "We certainly must get out at once all orders we have booked * * *."
>
> "It will be necessary for you, Mr. Altman, to move fast on this if we are to get this order shipped" (Plt. Ex. 4, R. 64-65).

This letter shows that the minds of the parties had met and the defendant considered it had booked an order to sell the 60,000 cases of milk.

No contention is made by defendant that it used the word "booked" with any other meaning than its dictionary one. This alone proves that defendant considered itself,—and was,—bound, and under contract with the plaintiff. The courts have held that the word "booked" indicates a valid acceptance of an offer.

In *Barteldes Seed Co.* v. *Fox,* 134 Okla. 248, 250, the court cited *Mente & Co.* v. *Heller,* 99 N. J. L. 475 as an authority saying:

> "In that case the court held in effect that the words there used: 'We have booked this business' and 'this order is booked' were in law an acceptance of the order and that it was the duty of the trial court to have so held."

In short, the present argument of defendant's counsel to the effect that the defendants' offer was to be an offer only when, if, and as the government might accept the offer for export, not only runs contrary to the language of the offer itself but is contrary to the view taken by defendant itself immediately after and following the plaintiff's acceptance.

In an effort to show that there was never an offer or that the offer was to become an offer only upon the happening of a condition precedent, defendant stresses the fact that the letter offering the milk said among other things, "this offer is subject to the government's acceptance for export and if a permit is issued for us to ship on above basis, we will try to get you additional quantities at that time." This language would normally mean at most that if the plaintiff accepted the defendant's offer, then it was a condition of the *contract* that it was to be subject to the government's acceptance for export. That this was the meaning appears from the language of the offer immediately following the above to the effect: "These additional quantities will probably be well in excess of *the above amount on which we are giving you a firm offer today.*" (Italics ours)

Defendant's present argument completely nullifies the effect of this last sentence by saying in effect that the firm offer is not a firm offer at all. It also nullifies the effect of that part of the offer which states "This tender is made with the understanding we are to have *a firm reply within two weeks from this date.*" (Italics ours) Defendant now seeks to construe the offer as merely a proposition, or an offer, if you please, to make an offer, in the event the government accepted for export. Such is not the language, as it was in *Campbell Investment Co. v. Taylor,* 246 Ill. App. 433, relied on by defendant in the Court of Appeals and properly held not in point by that court in its opinion (R. 100).

The case of *F. W. Berk & Co.* v. *Derecktor,* 301 N. Y. 110; 92 N. E. 2d 10) now relied on by defendant in this court (Pet. Cert. 36-38) is in the same category as the *Campbell Investment* case.

The reference in defendant's letter of May 28, to "the price agreed upon" (Plt. Ex. 4, R. 64) is further evidence defendant, itself, after acceptance of its offer by plaintiff, considered that a contract existed. Had the defendant not considered it was under contract to sell the milk it would not have referred to the price as "the price agreed upon". Neither would it have been concerned about getting the order out, nor stated "More important than getting a letter of credit is to first obtain OPA authorization. We cannot take any chances shipping without OPA authorization" (Plt. Ex. 4, R. 65).

So far as the various Illinois cases quoted from by defendant on pages 32 to 35 inclusive of its Petition are concerned, they but announce, for the most part, well recognized rules of construction relating to contracts. The Court of Appeals recognized these rules and applied them to the evidence in the case at bar. Though the result reached is distasteful to defendant, here again, it has an adverse decision on a factual rather than a legal question.

Not only did defendant consider that the provision for government acceptance was in the same class as the opening of a letter of credit but such was also the position of its counsel in the trial court.

The following quotations from defendant's brief, submitted to the trial court after the hearing, are illustrative:

> "Moreover, the plaintiffs did not accept the offer, since they did not open a letter of credit nor procure an export license, which were acts to be performed as part of the acceptance" (Def. Tr. Br. ii).
>
> "The opening of the letter of credit and the procurement of the requisite export license were acts which were to be performed by the plaintiffs as part of the acceptance of the 'offer' and such acts were to be performed within two weeks of May 16, 1946,

in order to constitute a valid acceptance. The acts were never performed. There was, therefore, in law and in fact, no acceptance of the 'offer' and, consequently, there was no contract" (Def. Tr. Br. 27).

In other words, defendant's contention in the trial court was that its original offer was one of a unilateral contract. This is further illustrated by the following extract from the argument in the trial court:

> "The Court: You wanted the OPA approval, and you wanted the export license, and you wanted the letter of credit, all of which you wanted before the contract was binding, so far as you are concerned?
> Mr. Gariepy: (attorney for defendant) That is right." (P. 18, tr. proc. Judge Igoe, Apr. 11, 1949).

An offer containing language similar to the one in the case at bar appears in *Ryan* v. *United States,* 136 U. S. 68. There a telegram was sent offering to sell certain land for the sum of $12,000.00 to which telegram there was appended the following postscript: "P. S. The above offer is subject to the opening of Easterday Avenue along the south line". (136 U. S. 71) The purchaser, (U. S.), accepted the proposition for the sale "subject to the opening of Easterday Avenue along the south line". (136 U. S. 72). It was not even contended that because the offer expressly stated it was subject to the opening of Easterday Avenue, there could be no acceptance of the offer or any contract at all entered into until and unless Easterday Avenue were opened. The language meant merely that if the property was sold it was sold subject to the opening of street,—just as in the case at bar it meant that if the milk was sold it was to be sold subject to the government's acceptance for export. The *Ryan* case is a sufficient answer to the fanciful argument of defendant that because the offer stated the offer

was subject to government acceptance for export, it meant that no contract could be entered into until the government did accept it for export. The language in the offer, "subject to government acceptance for export" merely indicated that the milk was to be sold for export purposes.

That petitioner is confused and thinking of conditional acceptances the while it is talking about conditional offers seems apparent from its reliance upon *F. W. Berk & Co.* v. *Derecktor,* 301 N.Y. 110; 92 N. E. 2d 510. (Pet. Cert. 36-38)

True,—the acceptance must be as broad as the offer, but if there is an offer, no matter what its terms or conditions may be in reference to the contract proposed to be formed, and it is accepted as made, a contract at once arises. As was said by this court in *Ryan* v. *United States,* 136 U. S. 68 at page 85:

> "A mere offer to sell real estate, upon specified terms, may undoubtedly be withdrawn at any time before its acceptance. Such is the general rule. But if the offer be accepted without conditions, and without varying its terms, and the acceptance be communicated to the other party without unreasonable delay, a contract arises, from which neither party can withdraw at pleasure."

So in the case at bar, when plaintiff unconditionally accepted defendant's offer, a contract arose from which neither party could withdraw at pleasure.

III.

The amount of the judgment is correct.

The cases holding a plaintiff may elect to treat a repudiation as a breach and sue therefor are authority that the measure of damages in the event of such election is determined as of the date of the breach. In the case at bar, the plaintiff treated the repudiation contained in defendant's telegram of June 26, 1946 (Plt. Ex. 9, R. 67) as a breach. Defendant contends, however, that the contract was not breached as of that date but had been breached prior thereto on June 7, 1946 (Pet. Cert. 17, 38). The answer to this contention is obvious. Defendant could not by repudiating the contract before the time for performance cause a breach thereof except and unless the plaintiff elected to treat it as such. There was no election on the part of plaintiff to treat the attempted repudiation of the contract by defendant on June 7th as a breach and the trial court so found (Par. 9, Tr. Ct. Find. R. 73). It was not until after the final repudiation of June 26th that the plaintiff started suit. Prior to that time, notwithstanding defendant's repeated repudiations, and insistence on non contract terms, plaintiff kept urging the defendant to comply (Plt.'s Ex. 6, 8, R. 66, 67) (Pars. 9 and 10 Find. Tr. Ct. R. 73 and 74) All the time the price of milk was advancing (Deft.'s Ans. Par. 10, R. 8).

While on the subject of damages, it is a fair inference from the evidence that the defendant sold the milk in question during the three weeks in July, 1946 (R. 59) when temporarily there was no ceiling (R. 36). In any event, the defendant actually had 60,000 cases of milk on hand when it repudiated the contract (R. 59), which it thereafter sold (R. 60). As a result of breaching its con-

tract, defendant was able to, and did, sell the milk for at least enough above the contract price to pay the judgment and still not be out anything.

This being so, we close with the observation that even if the defendant honestly believed it had offered to enter into a dishonest contract and to sell milk at an illegal price as its counsel piously suggests (Pet. Cert. 7-10), it suffered no financial loss as a result thereof.

CONCLUSION.

There was no error in the proceedings or judgment of the District Court and the Court of Appeals properly affirmed the judgment. No reason for granting certiorari exists.

Respectfully submitted,

George W. Lennon,
231 S. LaSalle Street
Chicago 4, Illinois,

Jay Stough,
Daniel M. Schuyler,
100 W. Monroe Street,
Chicago 3, Illinois.
Attorneys for Respondent (Plaintiff).

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 308

DEAN MILK COMPANY,

Petitioner,

vs.

NATIONAL DAIRYMEN ASSOCIATION, INC.,

Respondent.

PETITIONER'S REPLY BRIEF.

FRED A. GARIEPY,
One North La Salle Street,
Chicago 2, Illinois,
Attorney for Petitioner.

OWEN RALL,
135 South La Salle Street,
Chicago 3, Illinois,
JOHN SPALDING,
One North La Salle Street,
Chicago 2, Illinois,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITIONER'S REPLY BRIEF.

MAY IT PLEASE THE COURT:

The plaintiff's answering brief first contends that the judgment below was not rendered for an unpleaded cause of action (pp. 4-5). Plaintiff states that plaintiff had performed conditions precedent, and that the complaint's "general allegations of compliance were strictly accurate" (p. 4). This argument repudiates the Court of Appeals' opinion that the cause of action on which a recovery was allowed was not the cause of action set out in the complaint (R. 104). The plaintiff then turns around and inconsistently argues in support of the Court of Appeals' opinion, that repudiation of the contract by defendant excused performance by plaintiff and was provable under the allegation of performance of conditions precedent by the plaintiff on the theory "that the pleadings might be considered as amended" (p. 15).

The plaintiff also (pp. 18-19) repudiates in this Court the finding of fact by the trial judge (R. 73) that plaintiff was ready, willing and able to comply with the contract up until June 26, 1946, upon which finding the Court of Appeals relied in affirming the judgment (R. 102-103). Plaintiff concedes that it was impossible to obtain the export license in May or June, 1946 (pp. 18-19) and regardless of the reason plaintiff gives for such an impossibility, this concession is fatal to the trial court's finding of readiness, ability and willingness to perform conditions precedent.

The plaintiff's concession that it could not in May or June, 1946, have procured an export license not only precludes a recovery for the full performance pleaded in the complaint, but now destroys the basis of recovery approved by the Court of Appeals for an anticipatory breach of the contract, because as we pointed out in our petition for certiorari (pp. 19-20) there can be no recovery for a defendant's repudiation of a contract unless the plaintiff proves that he was himself able to perform. No court has ever held that a plaintiff may recover for repudiation of contract by the defendant unless plaintiff proves either actual performance or ability to perform on plaintiff's part, and the plaintiff concedes on page 7 of its brief in this Court, that where repudiation is not treated as a breach, the plaintiff must keep the contract alive and is required to aver and prove ability to perform. On page 25 of its brief in this Court, the plaintiff says that it did not treat the telegram of June 7th as a breach and by this concession the plaintiff admits that it had an obligation to prove that up to June 26th it had the ability to perform the contract.

Here the Court of Appeals held that there had been no actual performance, and the plaintiff's concession that it was unable to obtain an export license in May or June, 1946, and its failure to prove its ability to put up a letter

of credit for approximately $250,000.00, destroy the last vestige of support for the judgment of nearly $84,000.00 against this defendant.

The defendant has been deprived of due process of law by the rendition of a judgment on an unpleaded cause of action which cause of action in turn has now been conceded not to have any support in the evidence.

Plaintiff makes the inexcusable statement (pp. 25-26) that defendant sold the milk in question at a profit over the offering price sufficient to pay the judgment without loss. We have no way to protect ourselves against this grossly unfair statement except to say that it is both unsupported by the record, and, in addition, is false.

The above comprises what we believe is a sufficient reply to the fatal inconsistencies of the plaintiff's answering brief. However, that brief contains numerous specious arguments and off-the-record arguments to which we reply below. In the portion which follows, we shall also amplify in some instances what has already been summarized above.

Plaintiff says (pp. 4-5) that our contention "that the cause of action for which judgment was rendered was not pleaded is a sheer misstatement of the facts". This criticism repudiates the holding of the majority of the Court of Appeals on this branch of the case. The majority opinion said (R. 104) that our contention "that since plaintiff did not prove the case alleged in the complaint, there can be no recovery" was not tenable and then proceeded to manipulate Rules 7 (a), 8 (d) and 15 (b) to conclude that "the pleadings may be considered as amended to cover the issues which were tried and decided" in order to affirm the judgment.

After rejecting the theory upon which the majority opinion rests, the plaintiff then paradoxically argues (p. 9) that the reasons which the majority opinion urged to sustain that theory are correct. Thus, plaintiff says (p. 9) that

under Rule 7 (a) no reply to defendant's answer was filed, and that by operation of Rule 8 (d) the *denial* in defendant's answer of performance of conditions precedent alleged in the complaint was "taken as denied or avoided." Plaintiff then says (p. 9) that waiver of performance of conditions precedent or estoppel to urge non-performance of such conditions precedent became issues in the pleadings by reason of an implied replication in avoidance sanctioned by Rule 8 (d). This argument means that Rule 8 (d) stands for the proposition that the office of a reply is to deny a denial in the answer or to plead in avoidance of a denial in the answer. The Court of Appeals so construed the rule in holding that the "issues which were tried and decided" were not the issues formed by the pleadings, although that Court did not even indicate what issues were tried and decided, and plaintiff seems unable to determine even now what the issues were, merely suggesting (p. 9) that the issues might have been waiver or estoppel or perhaps both. The perversion of Rule 8 (d) by the Court of Appeals has deprived defendant of the basic right to be heard on the issues in the case and that this is true is attested by the fact that the Court of Appeals has not stated and the plaintiff is unable to state what the issues were that have been "tried and decided".

Plaintiff makes the statement (p. 6) (advanced for the first time in this Court) that there is no distinction in Illinois law between an action for breach of contract and an action for anticipatory breach of contract. This is another departure from the theory of the majority opinion of the court below, which concedes (R. 95, 104) the distinction. The cases which plaintiff cites (pp. 5-7) in support of this assertion hold, not that there is no distinction between the two causes of action, but that there actually exists a cause of action for anticipatory breach or repudiation of contract for which suit may be maintained before

the time for performance of the contract, and failure of defendant to perform, has arrived.

The plaintiff says (p. 7) that there was no necessity for it to prove that it was able to perform conditions precedent in order to recover. This is a complete about-face from its position in the trial court where plaintiff sought to show (R. 47) its *ability* to procure an export license and to open a letter of credit. Likewise, the contention is wholly inconsistent with the findings of fact prepared by plaintiff that (R. 73) "up until June 26, 1946, plaintiff was ready, willing and able to comply with said contract" and that plaintiff was excused from "opening a letter of credit or securing governmental approval or acceptance for export".

The cases upon which plaintiff relies (pp. 22-24) do not hold that recovery may be had upon anticipatory breach of contract by one who is *unable* to perform conditions precedent. In *Mount Hope Cemetery Ass'n* v. *Weidenmann*, 139 Ill. 67 (1891), plaintiff, an employee, was wrongfully discharged by defendant and sued for breach of contract *prior* to the termination of the agreed period of employment and the case was tried *prior* to the expiration of that period. One contention of the employer was that the action could not be maintained for total breach of the contract for the reason that plaintiff could not establish that he would be "ready, willing and able", to perform during the period between the date of trial and the date when the contract terminated thereafter by its terms. The Court held this contention untenable for the reason that if this were true there could be no action for anticipatory breach of contract and that an action could therefore only be maintained after the time for completed performance had passed. The Court further pointed out (pp. 78-79) that the plaintiff was fully protected by the rule of damages to which the Court adhered, namely, that damages could be

assessed only *to the time of trial* in such an action, and not for the period from date of trial to the date of termination of the contract, and added that this rule was necessary because the plaintiff might die or otherwise be incapacitated during the latter period (*i. e.*, be unable to perform). There is not one word in the opinion to the effect that the plaintiff was not required to show that he was "ready, willing and able" to perform at the date of repudiation by defendant or that plaintiff might recover if the evidence showed plaintiff to be unable to perform. The exact contrary is shown to be the fact by the rule of damages adopted which (p. 79) "limits the judgment to the actual loss at the day of trial".

L. S. & M. S. Ry. Co. v. *Richards*, 152 Ill. 59 (1894), does not even intimate that a plaintiff may recover upon a repudiated contract where such plaintiff would not have been able to have performed his part of the contract. The case simply holds that where a contract is repudiated by one party, the other party may elect to treat the repudiation as putting an end to the contract for purposes of performance and, if this election is made, that such party is excused from *performance* or *tender of performance after the repudiation.* The case does not say that one who is unable to perform a contract may recover for non-performance by the other party, as plaintiff seems to think. Alternatively, the case holds that if the innocent party wishes to recover damages for the period from the repudiation to the agreed date of performance, such party may keep the contract alive, in which case he must keep himself in readiness to perform at the time fixed for performance in the contract. The plaintiff conceded that it was "entirely impossible" for plaintiff to perform the contract at bar.

The quotation in plaintiff's brief (p. 7) from 12 Am. Jr. Contracts, par. 330, omits that part of the final sentence

of the paragraph which states that, "in no case can a repudiation of a contract by one party be held equivalent to performance or a legal excuse for non-performance by the other party of conditions precedent, so as to authorize recovery as for performance of such conditions precedent." What the text says cannot be done is apparently plaintiff's theory of recovery.

The plaintiff says (p. 12) that the pleadings are not mentioned in defendant's statement of points. At the close of the evidence, defendant moved for a finding (R. 61). The theory of that motion was that there was no evidence to support the allegations of the complaint. The conclusions of law prepared by plaintiff state that the motion should be denied (R. 75). The denial of this motion is assigned as error (R. 81). Moreover, the statement of points specifically sets forth (R. 80-81) that the court below erred (1) in finding that plaintiff was ready, willing and *able* to perform, (2) in not finding that there is no evidence that plaintiff was *able* to secure an export license, (3) in not finding that there is no evidence that plaintiff was *able* to open a letter of credit, and (4) in not finding that plaintiff failed to perform conditions precedent.

Plaintiff argues at length (pp. 10-13) *dehors* the record that defendant had "advance notice" that the issues in the case were not those formed by the pleadings because more than two years before the trial in a hearing on a motion for summary judgment the trial judge is supposed to have stated orally to defendant's attorney that defendant's request for OPA approval in defendant's letter of May 28 (R. 64-65) meant to him that defendant practically "waived" opening of a letter of credit and procurement of an export license and also because in an affidavit filed by plaintiff in that proceeding there is supposed to be a statement that defendant "waived" the opening of a letter of credit and was "estopped" from raising the defense

that an export license had not been procured. There are several answers to this contention. First, the issues to be tried are formed by the pleadings. Such issues are not raised by conversations, even with the trial judge. Second, the letter of May 28 does not "waive" the export license or letter of credit, since those two conditions are insisted upon in that letter, as defendant's attorney pointed out in the purported colloquy reproduced in plaintiff's brief. Third, the use of the words "waived" and "estopped" in an affidavit filed two years before trial does not change the issues formed by the complaint and answer any more than the alleged conversation with the trial judge at that time changed those issues. This is clear from the fact that the trial judge himself at the trial expressly stated that the issue being tried was actual performance of conditions precedent and that ability to perform such conditions was not material (R. 47-48). There was no such surreptitious amendment of the pleadings in the summary judgment proceeding as plaintiff imagines. Fourth, there is not a scintilla of *evidence* in the record of plaintiff's ability to perform conditions precedent, which plaintiff now says there was no necessity to prove in order to recover, as we have already emphasized. Judgment was entered against defendant without evidence to support any cause of action and, specifically, without evidence to support the cause of action alleged in the complaint. The device which plaintiff has adopted of going outside the record to manufacture so-called issues which the District Judge said, in effect, were not issues on the trial of the case is in itself sufficient to establish that defendant was not afforded the elementary and basic right of an opportunity to be heard in the trial court.

Plaintiff's statement (pp. 13-14) that none of the six judges of the Court of Appeals thinks there is any conflict between the majority opinion in the case at bar and the

opinion in *Victory Cabinet Company* v. *Insurance Company of North America,* 183 F. 2d 360 (C. A. 7) is a gratuitous reflection upon the judges, since the *Victory Cabinet* case is decided on the point that one may not allege performance and recover on proof of waiver of performance and the majority opinion here says that such is not the law.

We note the following about plaintiff's repeated assertions (pp. 15-24) that the effectiveness of defendant's offer —as an offer—was not conditional upon the government's acceptance for export to Europe, despite the plain language of the offer to the contrary.

The plaintiff says (p. 18) that defendant did not intend the issuance of an export license as a condition precedent to the acceptance of defendant's offer by a promise because in that event the government would have been required to issue a license for export before it was known whether the milk was available for export. The fallacy in this contention, which deceived the Court of Appeals (R. 101), is, as we have stressed in our Petition (p. 36) that there was no requirement by the Office of International Trade of the Department of Commerce that an exporter have any property interest, contractual or otherwise, in the merchandise sought to be exported, a *fact* of which federal courts take judicial notice.

The plaintiff's contention (pp. 19-20) that because in defendant's letter and telegram of May 28, (R. 64-65) defendant spoke of the order in question as "booked" and required the export permit license before "loading", defendant considered the export license as a condition precedent to performance, and not to formation, of the contract is specious. The letter and telegram of May 28 were in reply to plaintiff's so-called "acceptance" of May 27 (R. 63) which defendant received the day after plain-

tiff's letter of May 25 (R. 68) in which plaintiff's president stated that he was "trying to have a few export licenses cleared * * * so that we can ship some milk abroad; will be in further touch with you." Upon receipt of plaintiff's "acceptance" the day following delivery of plaintiff's letter stating that plaintiff was "trying to have a few export licenses cleared", defendant assumed that the license had actually been procured and that the "acceptance" created a contract. It was not until May 29 when plaintiff inquired (R. 66) whether defendant would make an allowance for "domestic packing" and on June 6 when this inquiry was repeated (R. 66) and plaintiff also asked "will you store without charge for how long" that defendant realized that plaintiff had not and could not procure an export license. Defendant thereupon withdrew the offer "account your being unable to get export license." Defendant was misled by plaintiff into believing that plaintiff had obtained an export license and that there was a contract and for that reason so acted. Thus understood, defendant's subsequent conduct does not cast doubt upon the plain statement in defendant's offering letter that the *offer*—as an offer—was subject to the government's acceptance for export.

The case of *Ryan* v. *United States*, 136 U. S. 68 (1890) upon which plaintiff relies (pp. 23-24), is not in point. This was an action of ejectment by the United States to recover certain land alleged to have been sold and conveyed to the government. On December 18, 1886, the defendant and his wife deeded the land to the United States. Prior thereto, on September 8, 1886, the defendant had offered the land to the government at the sum of $12,000, with a postscript to the offer "The above offer is subject to the opening of Easterday Avenue along the south line". The acceptance of the United States was unqualified and "subject to the opening of Easterday Avenue along the south line." The

only question in the case, so far as the contract to sell was concerned, was whether that contract was valid under the statute of frauds. This Court held that the contract was valid and, in any event, that the subsequent, authorized delivery of a deed operated to cure any defect in the prior contract. There is no discussion whether the offer had been accepted because of failure to perform a condition precedent. That was not the question in the case. The apparent understanding of the parties and this Court was that the postscript "The above offer is subject to the opening of Easterday Avenue along the south line" meant that "The above offer is subject to an easement for the opening of Easterday Avenue along the south line." Consequently, the condition was treated as requiring the assent of the government to take the land subject to an easement and not, as in the case at bar, an act or event which must occur before the offer could be accepted. Since the government assented to the easement, the acceptance formed a contract. The question involved in the present case was not involved there.

Respectfully submitted,

FRED A. GARIEPY,
One North La Salle Street,
Chicago 2, Illinois,
Attorney for Petitioner.

OWEN RALL,
135 South La Salle Street,
Chicago 3, Illinois,

JOHN SPALDING,
One North La Salle Street,
Chicago 2, Illinois,
Of Counsel.